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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PAUL F. CONARTY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals has sanctioned a departure by the lower district court from the accepted and usual course of judicial proceedings in condoning the lower court's failure to adequately voir dire the jurors as to the extent that unauthorized prejudicial material was brought to the jury's attention.

2. Whether clarification is required for the standard of review to be applied in reviewing cases involving the intrusion of unauthorized materials into the jury room during deliberations, where the lower court failed to take minimal steps to inquire to what extent the unauthorized materials were brought to the jurors' attention and where there was a reasonable possibility that the use by the jurors of the unauthorized materials may have changed the outcome of the case.

3. Whether the en banc opinion of the court of appeals has departed from the accepted and usual course of judicial proceedings in affirming petitioner's convictions despite the strong indications that the government's surreptitious insinuation of its binders (summarizing the government's theory of the case and evidence in support thereof) into the jury room was intentional and that the jurors' use of the binders changed the outcome of the trial.

PARTIES INVOLVED

Petitioner Paul F. Conarty and codefendants John C. Best and Gregory J. Bewick were the defendants in the United States District Court, Northern District of Illinois, and appellants in the Seventh Circuit Court of Appeals. (Best and Bewick are filing a separate petition for writ of certiorari.) The United States of America was plaintiff below and appellee in the circuit court of appeals.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES INVOLVED	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS AND ORDERS BELOW	1
JURISDICTIONAL STATEMENT	2
CONSTITUTIONAL PROVISIONS	2
STATUTORY PROVISION	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	10
SUMMARY OF ARGUMENT	10
I. THE COURT OF APPEALS HAS SANCTIONED A DEPARTURE BY THE LOWER DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN CONDONING THE LOWER COURT'S FAILURE TO ADEQUATELY VOIR DIRE THE JURORS CONCERNING THE EXTENT TO WHICH UNAUTHORIZED AND PREJUDICIAL MATERIAL WAS BROUGHT TO THE JURY'S ATTENTION DURING ITS DELIBERATION	11
II. CLARIFICATION IS REQUIRED FOR THE STANDARD OF REVIEW TO BE APPLIED IN REVIEWING CASES INVOLVING THE INTRUSION OF UNAUTHORIZED MATERIALS	

INTO THE JURY ROOM DURING DELIBERATIONS, WHERE THE LOWER COURT FAILED TO CONSIDER WHETHER THERE WAS A REASONABLE POSSIBILITY THAT THE USE OF THE UNAUTHORIZED MATERIALS BY THE JURORS MAY HAVE CHANGED THE OUTCOME OF THE CASE 15

III.

THE EN BANC OPINION OF THE COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN AFFIRMING PETITIONER'S CONVICTIONS DESPITE THE STRONG INDICATIONS THAT THE GOVERNMENT'S INTRUSION OF ITS EXHIBIT BINDERS INTO THE JURY ROOM WAS INTENDED TO, AND DID, CHANGE THE OUTCOME OF THE TRIAL 18

CONCLUSION 21

JOINT APPENDIX
(separately bound)

	App. Page
Opinion of the United States Court of Appeals for the Seventh Circuit *En Banc* on Rehearing ...	1
Judgment of the United States Court of Appeals for the Seventh Circuit *En Banc* on Rehearing .	23
Panel Opinion of the United States Court of Appeals for the Seventh Circuit	25
Judgment of the Panel of the United States Court of Appeals for the Seventh Circuit	37

Judgment and Commitment Order (Best) 38
Judgment and Commitment Order (Bewick) 40
Judgment and Commitment Order (Conarty) ... 42
Order Denying Post Trial Motions 44
Order of the United States Court of Appeals for the Seventh Circuit Granting Rehearing 45
Affidavit of James S. Montana, Jr. 46
Affidavit of Susan G. Feibus 61
Affidavit of George P. Lynch 67
Affidavit of Leland Shalgos 74
Statement of Charles Michael Peters 77
Statement of Susan Bogart 81
Partial Report of Proceedings of April 24, 1987 84
Partial Report of Proceedings of June 9, 1987 86
Partial Report of Proceedings of June 12, 1987 87
Partial Report of Proceedings of June 15, 1987 101
Partial Report of Proceedings of June 16, 1987 107
Partial Report of Proceedings of July 7, 1987 149
Partial Report of Proceedings of August 27, 1987 150

TABLE OF AUTHORITIES

Cases	PAGE
Duncan v. Louisiana, 391 U.S. 145 (1968)	11
Frank v. Mangum, 237 N.S. 209 (1914)	20
Gibson v. Clanon, 633 F.2d 851 (9th Cir. 1980), *cert. denied* 450 U.S. 1035 (1981)	14
Hamling v. United States, 418 U.S. 87 (1974) .	20
Sanchez v. United States, 293 F.2d 260 (8th Cir. 1961)	12
United States v. Brown, 451 F.2d 1231 (5th Cir. 1976)	12
United States v. Bruscino, 687 F.2d 939 (7th Cir. 1982)	12, 15, 20
United States v. Thomas, 463 F.2d 1061 (7th Cir. 1972)	14
United States v. Ware, 247 F.2d 698 (7th Cir. 1957) .	12
United States v. Wiseman, 736 F.2d 421 (7th Cir. 1984)	15
Washington v. Texas, 388 U.S. 14 (1967)	20

Constitutional Provisions, Statutes, and Rules	
U.S. Const. amend. V	2, 18
U.S. Const. amend. VI	2, 18
18 U.S.C. § 3231	5
28 U.S.C. § 1254(1)	2
Rules of the Supreme Court of the United States, Rules 10.1(a) and 13.1	2
Fed. R. Evid. 606(b)	3, 14

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Paul F. Conarty, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the convictions of petitioner and his codefendants.

OPINIONS AND ORDERS BELOW

A panel of the Seventh Circuit Court of Appeals reversed petitioners' convictions. That opinion is set out in the Appendix[1] at App. 25-36 and is reported at 913 F.2d 1179. The judgment order of the Circuit Court is set out

[1] This petition is brought on behalf of Petitioner Paul F. Conarty. His codefendants below, John C. Best and Gregory J. Bewick, have filed a separate petition for writ of certiorari. Petitioner Conarty and codefendants Best and Bewick will seek to file in this Court a separate Joint Appendix to Petitions for Writ of Certiorari. Citations in the instant petition to App. ____ refer this Court to that joint Appendix.

at App. 37. An order vacating the panel opinion and granting rehearing en banc is set out at App. 45 and is noted at 924 F.2d 646. The opinion of the Seventh Circuit en banc, affirming the convictions of petitioner and his codefendants by a majority of six to five, and the dissenting opinion, are set out at App. 1-22 and reported at 939 F.2d 425. The court's judgment order is set out at App. 23-24.

JURISDICTIONAL STATEMENT

On July 3, 1991, a unanimous panel of three judges of the Seventh Circuit Court of Appeals filed its opinion. (App. 25-36) Following a petition for rehearing by the government, the court on January 25, 1991 vacated the panel opinion and ordered rehearing en banc. (App. 45) The court entered its en banc opinion on August 5, 1991. (App. 1-22) This petition for a writ of certiorari is timely filed within 90 days thereafter. Jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rules 10.1(a) and 13.1 of this Court.

CONSTITUTIONAL PROVISIONS

Petitioner maintains that his rights under the following provisions of the fifth and sixth amendments to the United States Constitution were violated by the en banc opinion of the circuit court:

AMENDMENT V

> No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . .

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .

STATUTORY PROVISION

Fed. Rules Evid. Rule 606, 28 U.S.C.

Rule 606. Competency of Juror as Witness.

* * *

(b) Inquiry into validity of verdict or indictment

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

STATEMENT OF THE CASE

Petitioner Paul F. Conarty and his two codefendants below (John C. Best and Gregory J. Bewick)[2] were indicted on thirty-five counts of mail fraud, misapplication of bank funds, bank fraud, and other offenses committed during the course of the failure of the American Heritage Savings and Loan Association, a federally insured institution, due in large part to the making of a number of loans to

[2] Codefendants Best and Bewick are filing a separate petition for writ of certiorari.

noncreditworthy borrowers. Best and Bewick were officers of the institution.[3]

The savings and loan had been in a precarious state since 1981. It owned, through wholly owned subsidiaries, a number of commercial real estate holdings. Codefendants Best and Bewick engaged in approving the making of loans conditioned on the borrower's agreeing to buy real estate from one of the institution's subsidiaries, and applied a portion of the monies borrowed to the down payment for the purchase of the real estate. Typically, the borrower was uncreditworthy.

Petitioner Paul F. Conarty became in-house counsel for the savings and loan institution in January, 1983. Prior to that time, he had no substantial involvement in the institution's affairs. Shortly thereafter, the institution failed.

In mid-February, 1983, six weeks after Conarty joined the institution, the loan on the Kings Point real estate development closed. Kings Point was the only transaction on which the charges against Conarty were founded. The Kings Point loan was to be made to a partnership consisting of three individuals—Henning, Pernice, and Andreuccetti—but the loan ultimately went to Andreuccetti because Henning and Pernice were ineligible to borrow from the institution, having reached their loan limit. (Tr. 5363-65)

At the Kings Point loan closing in February, 1983, the checks not earmarked for the down payment on the Kings Point property were made payable to Pernice and Henning,

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[3] The circuit court's majority opinion incorrectly states that Conarty was also an officer. He was not. Conarty did not join the institution until January, 1983, after all loan transactions had been approved by the institution's loan committee.

rather than to Andreuccetti, the borrower of record. Years earlier, Conarty, an attorney, had performed legal services for Henning and also for Pernice, for which he had not been fully compensated. Henning then caused checks to be "cut" to Conarty that paid Henning's full indebtedness to Conarty. Likewise, Pernice also cut a check to Conarty to pay off his pre-existing debt for legal services. (Tr. 5368-70)

After the savings and loan institution failed in 1983 and went into receivership, Best and Bewick were terminated as officers. Conarty continued to work at the institution until 1985, even after it passed into the hands of the Federal Home Loan Bank Board and later the Federal Savings and Loan Insurance Corporation. (Tr. 5370-71)

The government commenced criminal prosecution in the United States District Court for the Northern District of Illinois pursuant to 18 U.S.C.A. § 3231. Petitioner Conarty was named in only eight of the thirty-five indictment counts.

The trial lasted seven weeks. Most of the evidence at trial related only to codefendants Best and Bewick and their relationship to a number of the loans. Only a very small amount of the government evidence was directed at Conarty. Of the eight indictment counts relating to Conarty, one charged him and his two co-defendants with conspiracy; two counts charged him with mail fraud for allegedly sending through the mails documents in connection with the Kings Point loans: a Form 107 and a recorded warranty for Kings Point Buildings 5 and 6. Three counts charged Conarty with misapplication of savings and loan funds by causing the loan of savings and loan money to Buildings 3, 4 and 5 of Kings Point. Two counts charged Conarty with allegedly receiving monies (the checks from

Henning and Pernice) from the Kings Point Building 4 loan with intent to defraud the savings and loan.

Conarty's defense at trial was that he had nothing to do with the approval of any of the loans in question or any substantive decisionmaking as to the loans (he had not yet joined the bank until after all the loans had been approved by the institution's loan committee) and was unaware that the loans were undersecured, that he had no intent to defraud, and that (by the account of defense and government witnesses), the checks he received from Pernice and Henning were proper reimbursement for legal services he had performed for those two men in the past.

During the trial, the Government utilized three-inch ring binders to present some of its key documentary exhibits to the jury. The binders were divided by plastic tabs into sections, each representing a loan transaction. There were thirteen such sections, including sections on the Kings Point loans.[4] Each of the jurors was in possession of one of the binders during the trial. The binders were not marked as exhibits. The government never asked the trial court to admit the binders in evidence. The jurors were told not to look at any of the documents in the binders unless directed to do so. (App. 93) The binders were not available to the jurors during recess. (App. 85-86)

At the close of the evidence and before jury deliberations began, the prosecutors and defense counsel reviewed the exhibits to be submitted to the jury. (Tr. 5959-60) Counsel advised the court that the exhibits to go to the

[4] Petitioner Conarty and codefendants Best and Bewick (who have filed a separate petition for writ of certiorari) have filed in this Court a motion asking this Court to direct the Seventh Circuit Court of Appeals to transmit the binders to this Court.

jury (ten boxes of documents) were set aside. Defense counsel left the courtroom. (App. 87, 112)

Later, one of the government prosecutors and an FBI agent placed a number of the government's binders onto the exhibits cart, which was later taken to the jury. (App. 50-56, 59-60, 62-64, 67-69, 75-76, 78-80)

All of the documents within the government's binders were admitted in evidence at trial. However, not all of the documents were admitted against all of the defendants, although the order of the documents in the government's binder obscured that fact.

The jury retired to deliberate on Tuesday, June 9, 1987. (App. 67) On Friday, June 12, 1987, defense counsel learned for the first time (from an offhand remark by the courtroom marshal) that the government binders had been sent back to the jury. (App. 69, 88) Counsel for Conarty and his codefendants joined in a motion for mistrial based on the introduction of the binders into the jury room. (App. 87-88) The court ordered the binders removed from the jury room that evening (Friday, June 12). (App. 96)

The jury returned Monday morning, June 15, to continue deliberations. The foreperson inquired about the fact the binders were no longer in the jury room. The jury was not told why the binders were removed. (App. 101-107) The jury returned its verdict that afternoon. (App. 107) Conarty was found guilty of six of the eight counts with which he was charged.

The court later conducted a voir dire examination of the jurors. Despite suggestions by defense counsel for questions to be put to the jurors, the court asked only one question of each juror: whether he or she had used the government binders to the exclusion of the original trial

exhibits in the ten boxes. All the jurors said that they had relied to some degree on the binders, but that they also examined original exhibits. (App. 134-147)

Subsequently, defense counsel submitted sworn affidavits in which they averred that prior to the time the jury began to deliberate, one of the defense counsel had approached Assistant United States Attorney Susan Bogart and inquired whether Ms. Bogart was going to ask leave to send the binders back to the jury. Ms. Bogart represented that she was not going to do so. (App. 46-76, 90-93, 107-120) One month later, the government responded to the defense's allegation of prosecutorial misconduct by tendering to the court a written memorandum and two statements. Labelled as affidavits, these were unsworn statements by Assistant United States Attorney Bogart and an FBI agent. (App. 77-83)

The government never denied that it never informed the defense that it would send the binders back to the jury room. The prosecutor did deny telling defense counsel that she would not send the binders to the jury (App. 63, 92); but her denial was not on oath, either by way of a sworn affidavit or by sworn in-court testimony. Throughout the several weeks that the defense motion for mistrial based on prosecutorial conduct was pending, the government unfailingly objected to the court conducting an evidentiary hearing on the issue of prosecutorial misconduct. (App. 81-83)

Most of the facts surrounding the entry of the binders into the jury room were not in dispute. It is undisputed that the government never asked leave of court to send the binders to the jury. The binders were in the jury box when defense counsel left the courtroom, whereas the exhibits to be taken to the jury had been segregated. After

defense counsel walked out of the courtroom Assistant United State's Attorney Bogart and the FBI agent took the binders from the jury box and placed them on the cart containing the trial exhibits that the court had ruled could be viewed by the jury. The cart was taken to the jury room. (App. 55-56, 78-79, 81-83)

Following the convictions of Conarty and his codefendants the district court judge sentenced codefendant Best to a year and a day in prison and sentenced codefendant Bewick to six months on work release. The court sentenced petitioner Paul F. Conarty to probation. All three appealed to the Seventh Circuit Court of Appeals. The opinion of a three-judge panel (authored by Circuit Judge Posner) reversed their convictions and ordered a new trial. (App. 25-36) The panel termed the government's action in this case "misconduct" (App. 36) and noted:

> The furnishing of these binders to the jurors was, in the circumstances, a form of jury tampering—a subtle form, but perhaps not less effective because of its subtlety. The case is within the orbit of the decisions that find reversible error when documents summarizing the government's case find their way into the jury room. [App. 35]

Signally, the panel opinion observed:

> This was a close case, and the government's misconduct may well have made a difference to the outcome, *at least with regard to defendant Conarty*, and to some of the counts against the other defendants as well. [App. 36]

The government's petition for rehearing en banc was allowed, and the cause was reargued. In a six-to-five en banc decision, the Seventh Circuit Court of Appeals vacated the panel opinion and affirmed the judgment of the district court. (App. 1-22)

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

When it became apparent that the prosecution had caused its binders of government exhibits to be sent to the jury room with trial exhibits, the district court judge acted correctly in promptly removing the binders from the jury room. When the court conducted its voir dire of the jurors after the jury verdicts were returned, however, the court erred in making only a superficial inquiry whether the jurors had used the binders to the exclusion of the original exhibits, and then denying petitioner's motion for a mistrial. The court should have made a more detailed inquiry to determine whether the binders had altered the jury verdicts.

Absent a proper inquiry by the trial court into the impact of the binders on the jury's verdicts, the six-judge majority of the circuit court of appeals should have considered further the question whether petitioner was prejudiced by the introduction of the binders. The five-judge dissent properly noted that the majority prematurely affirmed the trial court judgment without inquiring whether the petitioner was prejudiced by the introduction of the unauthorized binders into the jury room. The dissenting opinion makes a strong case for this Court scrutinizing the standard for review applicable to cases in which unauthorized materials have been intentionally and secretly sent into the jury room.

The record in this case provides ample evidence to demonstrate that the government's action in insinuating its unauthorized binders into the jury room, as a "blueprint" of the government's case, was intentionally designed to convey to the jurors the false impression that exhibits ad-

mitted at trial against petitioner's codefendants were equally applicable to petitioner. The result was that the government binders acted as a thirteenth juror in the jury room, to deny petitioner of his constitutional rights to due process of law and trial by an impartial jury.

I.

THE COURT OF APPEALS HAS SANCTIONED A DEPARTURE BY THE LOWER DISTRICT COURT FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN CONDONING THE LOWER COURT'S FAILURE TO ADEQUATELY VOIR DIRE THE JURORS CONCERNING THE EXTENT TO WHICH UNAUTHORIZED AND PREJUDICIAL MATERIAL WAS BROUGHT TO THE JURY'S ATTENTION DURING ITS DELIBERATION.

Of all the rights granted to us by our federal constitution, the right to trial by a fair and impartial jury of our peers is one of those most cherished. Trial by jury in criminal cases is fundamental to the American scheme of justice. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor . . . ." *Id.*

In the instant case, petitioner Paul Conarty was deprived of that fundamental right when an overzealous prosecutor insinuated into the jury room, without knowledge of the trial court or defense counsel, twelve or more copies of a three-ring binder containing carefully ordered exhibits which provided the jury with a roadmap to the government's case so as to find petitioner Conarty and his codefendants guilty of the charges against them. The effect of the introduction of the binders into the jury room

was devastating to the defense. In effect, the binders became a thirteenth juror, a government prosecutor leaning over the jurors' shoulders and showing them a blueprint to signing guilty verdicts.

The initial question is whether it was error to send unauthorized documents to the jury room. Patently, the authorities proclaim that that practice is error. *See United States v. Brown*, 451 F.2d 1231 (5th Cir. 1976); *Sanchez v. United States*, 293 F.2d 260 (8th Cir. 1961); *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957).

The panel opinion and the opinion of the circuit court en banc recognized this principal and its support in the law. However, because all of the documents in the government's binder had been admitted in evidence at trial and were duplicates of exhibits among the ten boxes of exhibits which the trial court allowed the jury to have during deliberations, both the trial court and the majority of the circuit court of appeals en banc concluded that the use of the binders by the jury during deliberations was harmless error, and made their rulings with no further analysis.

The majority of the circuit court en banc ruled that the threshold issue was "whether the district court acted reasonably in refusing to set aside the verdict because it found no possible prejudice." [Citing *United States v. Bruscino*, 687 F.2d 939, 940 (7th Cir. 1982) (en banc). [App. 8] The circuit court majority concluded that if it were found that the district court did not abuse its discretion, the issue of government misconduct need not be reached. [App. 8]

The majority and dissent noted that a review by a circuit court of appeals of a district court's judgment is

deferential. [App. 8-9, 21] The point of departure between the majority and the dissent came with the manner in which the district court judge handled the problem once it became known the jurors had the government binders.

The jury deliberated from Tuesday through Friday. On Friday, June 12, 1987, defense counsel learned that the jurors had possession of the government binders. (App. 69, 88) At the trial court's direction, the binders were removed from the jury room Friday night after the jurors went home for the weekend. (It was discovered that the binders contained notes and papers inserted into their pages, suggesting that the binders were heavily used by all the jurors.) When the jurors returned Monday morning and realized the binders were gone, they notified the court. After lunch on Monday, and before the court responded to the jurors' inquiry about the binders, the jurors returned their verdicts. (App. 101-07)

Prompted by the defendants' motion for a mistrial, the district court conducted an inquiry of each juror before the jury was dismissed. Rejecting defense counsels' suggested line of questioning, the court asked only one question of each juror: whether they had consulted the original exhibits as well as the binders. When the jurors said they had, the court denied the motion for a mistrial. (App. 134-148, 158-159)

This was error. The district court's inquiry did not go far enough. As the circuit court's dissenters noted:

> It is the rare case of introducing unauthorized materials into the jury room in which the jury looks *only* at those materials. That cannot be the decisive consideration. Nor the fact that the exhibits in the binders were in evidence . . . . The binders—Ariadne's thread through the maze constituted by the ten boxes of original exhibits—were not in evidence. [App. 21]

Inquiry into the reasoning process by which a jury reaches its verdict is precluded by court rule, Fed. R. Evid. 606(b). That rule, however, does not prohibit inquiry into the prejudicial impact of extraneous information on the jury's deliberations. The court must take steps to insure that jury deliberations are unimpeded by outside influence. *Gibson v. Clanon*, 633 F.2d 851 (9th Cir. 1980), *cert. denied* 450 U.S. 1035 (1981). *See United States v. Thomas*, 463 F.2d 1061 (7th Cir. 1972).

In the case at bar, the trial court abrogated its responsibility when it conducted only a cursory examination of the jury. Having determined that each juror had relied to some extent on the government binder in reaching his or her verdict, the district court judge should have inquired further. As the dissent noted, the court should have inquired into the effect on the jury's deliberations of the order in which the exhibits were presented in the government's binders:

> —for example, had the jurors assumed that Conarty had seen Andreucetti's financial statement and the other documents for the Kings Point loan? On the basis of such inquiry, plus an evaluation of the strength of the evidence against Conarty and the other defendants, the judge could have made an informed and responsible decision as to whether there was a reasonable possibility that the use of the binders in the jury's deliberations had changed the outcome of the case—and we would be bound by that decision. The judge's perfunctory and loaded inquiry (e.g., "Did you use the jury book to the exclusion of all the other exhibits and evidence you heard in the case?") suggests more than anything else a determination not to have to sit through another seven-week trial. [App. 21-22]

Noting that the district court's failure to exercise discretion could not be remedied (because "[t]he jurors are scat-

tered to the winds and can no longer be questioned about the impact of the binders"), the five circuit judges in dissent concluded that the only remedy is to award petitioner and his codefendants a new trial. [App. 22]

II.

CLARIFICATION IS REQUIRED FOR THE STANDARD OF REVIEW TO BE APPLIED IN REVIEWING CASES INVOLVING THE INTRUSION OF UNAUTHORIZED MATERIALS INTO THE JURY ROOM DURING DELIBERATIONS, WHERE THE LOWER COURT FAILED TO CONSIDER WHETHER THERE WAS A REASONABLE POSSIBILITY THAT THE USE OF THE UNAUTHORIZED MATERIALS BY THE JURORS MAY HAVE CHANGED THE OUTCOME OF THE CASE.

The authorities do not permit reversal of a conviction unless there was a "reasonable possibility" that the error (the presence in the jury room of unauthorized materials) affected the jury's verdict. *United States v. Bruscino, supra,* 687 F.2d at 940. Whether such a reasonable possibility exists is a judgment to be made in the first instance by the trial judge. In cases in which the issue of introduction of unauthorized materials into the jury room is raised, courts of appeal have affirmed a district court judge's refusal to declare a mistrial where the district court has framed the inquiry relevant to his exercise of discretionary judgment in a responsible fashion. *See, e.g., United States v. Wiseman,* 736 F.2d 421, 426 (7th Cir. 1984).

The circuit court dissenters noted in the instant case, however, that the district judge failed to frame the relevant inquiry in a proper and responsible fashion. The dissent correctly concluded that an affirmance of the trial court's judgment was error.

The crucial area of inquiry, which the district court and the majority of the circuit court erroneously refused to entertain, is whether there was a reasonable possibility that the use of the government binders in the jury's deliberations had changed the outcome of the case.

Petitioner Conarty maintains, as did the five dissenting circuit judges, that there was a reasonable possibility that the use of the binders altered the jury's verdict. The fact all documents in the government's binder had been admitted in evidence was not determinative and did not render the error harmless, and that the trial court's post-verdict limited questioning of the jurors was incomplete, for these reasons:

1. The jurors were not permitted to use the binders during trial for the purpose of considering guilt or innocence, for the reason that they were charged not to begin deliberations until the parties had rested and the jury had been sent to deliberate. The only use made by the jurors to the binder documents during trial was to view specific exhibits as the government utilized them during trial and offered them in evidence.

2. While all the documents had been admitted in evidence during trial, not all had been admitted against Conarty. For example, the three sections of the binder dealing with the Kings Point loan closings contain, *inter alia*, loan applications by Joseph Andreuccetti, financial statements indicating his creditworthiness was suspect, loan commitment papers, loan settlement statements, and, finally, checks issued to Conarty for what every witness at trial (government and defense) who testified to this point described as payment for prior legal services by Conarty to borrowers Henning and Pernice, completely unrelated to the Kings Point loans or any other loans

made by the Savings and Loan. The documents pertaining to the application for and approval of the Kings Point loans in late 1982 had nothing to do with Conarty. Again, every government and defense witness who testified on this subject stated that Conarty joined the S&L in January, 1983, *after* the loans had been approved by the institution's loan committee. (See Tr. 4615, 4974) However, the government's binder so arranged the binder as to include both the paperwork from the Loan Committee and the checks issued to Conarty, suggesting falsely and unfairly that the loans to Conarty were payment to him for helping to secure the loans.

3. The government intentionally and secretively insinuated the binders into the jury deliberation room. This is patent from the district court record, where, in a written statement, an FBI agent admitted that he loaded the binders onto the cart containing exhibits bound for the jury deliberation room. (App. 77-78)[5] Though concerned about the possibility the government had acted deliberately to place the binders with the jurors, the trial court refused to hold a hearing on the allegation of government misconduct. The court ruled that the fact all the documents in the government binders were in evidence was dispositive on the ground the error was harmless, whether or not the government's action was intentional. The trial court's refusal to conduct a hearing on the issue of government misconduct was reversible error.

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[5] The majority opinion of the circuit court *en banc* is in error in stating that "the record contains the conflicting affidavits of the prosecutor and the defense counsel . . ." (App. 14) The defense attorneys filed affidavits [reproduced at App. 46-76]; the prosecutor and FBI agent filed non-sworn statements [App. 77-83].

III.

THE EN BANC OPINION OF THE COURT OF APPEALS HAS DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN AFFIRMING PETITIONER'S CONVICTIONS DESPITE THE STRONG INDICATIONS THAT THE GOVERNMENT'S INTRUSION OF ITS EXHIBIT BINDERS INTO THE JURY ROOM WAS INTENDED TO, AND DID, CHANGE THE OUTCOME OF THE TRIAL.

The trial court's refusal to go beyond the question of whether the binder documents were in evidence, and its refusal to conduct a hearing into the misconduct of the prosecutor, constituted reversible error which deprived petitioner Paul F. Conarty the right to due process of law pursuant to the fifth amendment and deprived him of the right to trial by a fair and impartial jury under the sixth amendment. U.S. Const. amends. V, VI.

The main objectives of the government prosecution were codefendants Best and Bewick, two officers of the savings and loan who were charged in most of the thirty-five counts in the indictment; Conarty was charged in only eight of the counts. Before trial, petitioner Conarty moved to sever his prosecution from that of his codefendants; his motion was denied on the basis of one count (Count 1), alleging conspiracy between him and codefendants Best and Bewick. Conarty was ultimately acquitted of the conspiracy count. His convictions for mail fraud, misapplication of bank funds, and bank fraud concerned only one set of loan transactions (the Kings Point loans) and had virtually no connection with the convictions of his codefendants. In the district court and in the circuit court of appeals, Conarty alleged that the joinder was error.

The government's introduction of the binders into the jury room seems to have been aimed at securing a con-

viction against Conarty, against whom its case was the most tenuous; and Conarty surely was prejudiced far more by the binders than his codefendants. This was not lost on Circuit Judge Posner who, writing for the five dissenters, noted:

> I said that you can convict a man with a tendentious compilation of evidence. I will illustrate with Conarty. Best and Bewick, Conarty's two codefendants, were, respectively, the top man and the second in command at a savings and loan association. They were charged with approving a number of improper loans, but Conarty, the association's in-house counsel, was charged in connection with only one of these transactions, the Kings Point loan. It was a loan to a partnership, but two of the three partners were ineligible to borrow from the bank. One of them, Henning, was in bankruptcy. This much Conarty undeniably knew because he was one of Henning's creditors and had filed a claim in the bankruptcy proceeding. Another partner, Andreuccetti, also was uncreditworthy, although there is no evidence that Conarty knew this. At the closing, some of the loan moneys were paid directly to Henning, who then cut a check to Conarty that paid off Henning's indebtedness to him in full. Pernice, the third borrowing partner, also used a portion of the loan moneys to pay a preexisting debt to Conarty. Conarty received a total of $13,000 at the closing. The loan was improper, and if Conarty knew this he was guilty of fraud. There was circumstantial evidence—not least the use of a part of the loan to pay off unrelated debts to him—that he did know. But it was a close case. One reason Judge Bua gave for not quizzing the jurors about the binders before the jury completed its deliberations was that the issue would be moot if the jury returned verdicts of not guilty. In his words, "there's a chance, and I see it quite possible, that Mr. Conarty's case could very well go not guilty."

> The government binders made it easy for the jury to infer Conarty's guilty knowledge, because they grouped all the documents relevant to the Kings Point transaction under one tab, which the boxes of original documents did not do. There were the checks cut to Conarty right alongside the loan documents themselves. In fact the checks were located in the binder directly after Andreuccetti's unimpressive financial statement, demonstrating his lack of creditworthiness, even though there was no evidence that Conarty (who was not a member of the savings and loan association's loan committee) had ever seen the statement, or for that matter the loan documents. It was a suggestive juxtaposition. [App. 18-19]

Trial error prejudicial to petitioner occurred when both the district court and the en banc majority opinion refused to consider the involvement of the government in surreptitiously introducing its binders into the jury room. *United States v. Bruscino*, 687 F.2d 938, 939-40 (7th Cir. 1982). The government's intentional submission of unauthorized material to the jury deprived petitioner of due process of law and of his right to be trial by a fair and impartial jury.

> Whatever disagreement there may be as to the scope of the phrase "due process of law," there can be no doubt that it embraces the fundamental conception of a fair trial with the opportunity to be heard.

Oliver Wendell Holmes, *Frank v. Mangum*, 237 N.S. 309, 347 (1914). A fundamental element of the due process of law is the criminal defendant's right to present a defense. *Hamling v. United States*, 418 U.S. 87, 125 (1974); *Washington v. Texas*, 388 U.S. 14 (1967). In the case at bar, that right was denied petitioner, because the prosecution gained access to the jury during its deliberations and became, in effect, a thirteenth juror to sway the jury to return a guilty verdict.

CONCLUSION

For all of the foregoing reasons, petitioner PAUL F. CONARTY respectfully requests that this honorable Court grant certiorari to review the en banc ruling of the Seventh Circuit Court of Appeals and, upon such review, to reverse the Court of Appeals and remand the cause to the district court with directions that the indictment be quashed and petitioner be discharged or, alternately, that petitioner be granted a new trial.

Respectfully submitted,

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91-748

Nos. (2)

1991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN C. BEST and GREGORY J. BEWICK,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PAUL F. CONARTY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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162

TABLE OF CONTENTS

	PAGE
Opinion of the United States Court of Appeals for the Seventh Circuit *En Banc* on Rehearing ...	1
Judgment of the United States Court of Appeals for the Seventh Circuit *En Banc* on Rehearing .	23
Panel Opinion of the United States Court of Appeals for the Seventh Circuit	25
Judgment of the Panel of the United States Court of Appeals for the Seventh Circuit	37
Judgment and Commitment Order (Best)	38
Judgment and Commitment Order (Bewick)	40
Judgment and Commitment Order (Conarty) ...	42
Order Denying Post Trial Motions	44
Order of the United States Court of Appeals for the Seventh Circuit Granting Rehearing	45
Affidavit of James S. Montana, Jr.	46
Affidavit of Susan G. Feibus	61
Affidavit of George P. Lynch	67
Affidavit of Leland Shalgos	74
Statement of Charles Michael Peters	77
Statement of Susan Bogart	81

Partial Report of Proceedings of
April 24, 1987 84

Partial Report of Proceedings of
June 9, 1987 86

Partial Report of Proceedings of
June 12, 1987 87

Partial Report of Proceedings of
June 15, 1987 101

Partial Report of Proceedings of
June 16, 1987 107

Partial Report of Proceedings of
July 7, 1987 149

Partial Report of Proceedings of
August 27, 1987 150

IN THE

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OCTOBER TERM, 1991

JOHN C. BEST and GREGORY J. BEWICK,
Petitioners,

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UNITED STATES OF AMERICA,
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v.

UNITED STATES OF AMERICA,
Respondent.

Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX TO PETITIONS FOR WRIT OF CERTIORARI

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 87-2456, 87-2457 and 87-2458

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN C. BEST, GREGORY J. BEWICK
and PAUL F. CONARTY,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 CR 442—**Nicholas J. Bua,** *District Judge.*

ARGUED APRIL 5, 1990
REARGUED *EN BANC* JUNE 11, 1991
DECIDED AUGUST 5, 1991

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges.*

BAUER, *Chief Judge.* In this *en banc* review, we must decide whether the defendants were deprived of a fair trial due to the presence of binders containing certain government exhibits in the jury room during deliberations. In our prior opinion, *see United States v. Best*, 913 F.2d 1179 (7th Cir. 1990), *vacated*, 924 F.2d 646 (7th Cir. 1991), a panel of this court held that the presence of the binders during jury deliberations was jury tampering that constituted reversible error. After rehearing the case *en banc*,

we now hold that the presence of the binders in the jury room was not error, and, therefore, affirm the defendants' convictions.

I.

Having recited the complex facts of this case in the earlier opinion, we need only glean from that recitation here. *See Best*, 913 F.2d at 1181. John C. Best, Gregory J. Bewick, and Paul F. Conarty were indicted on thirty-five counts of mail fraud, misapplication of bank funds, bank fraud, and related crimes committed in the course of the failure of the American Heritage Savings and Loan Association ("American"), a federally insured institution of which Best, Bewick, and Conarty were officers. Best was its president and chaired its Board of Directors, Bewick its executive vice-president and managing officer, and Conarty its in-house counsel.

American had been experiencing financial difficulties since 1981, when the State of Illinois Commissioner of Savings and Loans and the Federal Home Loan Bank Board conducted a joint examination of its economic condition and projected a net loss in excess of $1.7 million and net worth deficiency of approximately $200,000 by the end of the fiscal year. Between late 1981 and mid-1983, Best and Bewick, joined later by Conarty, embarked on a course of desperate efforts to keep American afloat. It was those actions that eventually led to the insolvency of the association and gave rise to this prosecution.

By 1981, American and its subsidiaries, American Heritage Service Corporation ("Service"), Metrodyne, Incorporated ("Metrodyne"), and Landfinder's Realty Corporation ("Landfinder's"), had accumulated large holdings in real estate, primarily through foreclosure, known as "real estate owned" or "REO." Best wanted to get the REO off American's books because it was a non-earning asset and a drain on American's earning power. In addition to several other practices that violated the norms of the savings and loan industry, Best and Bewick would require

borrowers to purchase REO from American and its subsidiaries as a condition of obtaining a loan. *See Id.*, 913 F.2d at 1181. In so doing, Best and Bewick attempted to disguise the American's deteriorating financial status. They would apply as much of the loan as was necessary to cover the down payment for the purchase of the real estate. By this tactic, Best and Bewick, in effect, were selling American's real estate to the borrower—who typically was not creditworthy and known by Best and Bewick to be so—for no cash down. Moreover, they were selling this real estate at inflated prices, based on inflated appraisals, so that American could book a profit on the sales and thereby improve its balance sheet even though it was extremely unlikely that the borrower would be able to complete the payments for the property or that, when the borrower stopped making payments, the property could be sold for a price equal to the purchase price—or for that matter, equal to the loan. *Id.* While engaging in these reckless transactions, which predictably flopped, and while the bank was losing money hand over fist, Best and Bewick paid themselves large bonuses from the Landfinder's account. *Id.*

Conarty became involved when he joined American as its in-house counsel in early 1983. During that year, American made sizeable loans to a partnership, but two of the three partners were ineligible to borrow from the association because they had reached their loan limit. Conarty at least knew that one of the partners was in bankruptcy because he was one of that partner's creditors and had filed a claim in the bankruptcy proceeding. *Id.* The loan was made to enable the partnership to purchase and develop real estate owned by American, yet the proceeds of the loan were going to two of the partners to enable them to pay off pre-existing debts unrelated to the real estate project. This loan, therefore, constituted a misuse of bank funds of which Conarty was aware and in which he participated.

As American's financial condition deteriorated, the Federal Home Loan Bank Board ("FHLBB"), which promul-

gates and enforces the rules and regulations that govern federally insured savings and loan associations, more carefully scrutinized American's lending practices. Between 1981 and 1983, Best and Bewick were able to keep the examiners at bay, in part by concealing the ultimate recipients of loan proceeds. Best's and Bewick's maneuvers to continue to manipulate the net worth of American allowed it to continue to operate approximately one year beyond the point of insolvency. It was only after an extensive review of the loan files and the other records of the association that the examiners were able to determine the true recipients of the loan proceeds. The FHLBB took control of American in 1984—an event that would have occurred much sooner if the true financial condition of American had not been concealed by Best and Bewick.

A jury trial commenced on April 20, 1987, in the United States District Court before the Honorable Nicholas Bua. After a seven-week trial, the jury found Best and Bewick guilty of all counts save one. The jury found Conarty guilty of six counts, including mail fraud, misapplication of savings and loan funds, and participation by a savings and loan officer in an improper loan. Four months later, Judge Bua sentenced Best to one year and a day in prison, three years probation, and five hundred hours of community service; Bewick to six months work release, three years probation, and five hundred hours of community service; and Conarty to three years probation and four hundred hours of community service.

All three defendants appealed. A panel of this court reversed the defendants' convictions and remanded the cause to the district court. We vacated that opinion and granted the government's petition for rehearing *en banc* to reconsider whether the jury's use of the government's binders during deliberations constitutes reversible error.

II.

Near the beginning of the trial, the government furnished each juror with a loose-leaf binder containing the

key government exhibits arranged by transaction. The district court understood that the binders would be used to help the jury follow the descriptions of the various exhibits. *See* Transcript of Trial Proceedings ("Trial Trans.") at 677. Yet, because the exhibits in the binders had not yet been placed in evidence, the judge told the jurors not to look in the binders until a particular exhibit was admitted into evidence, and then to look only at that exhibit in the binder. He also told them to leave the binders in the jury box during recesses. *See Id.* at 678, 730. The binders remained in the jury box with the jurors throughout the trial. None of the defendants objected to this use of the binders by the jury. *See Id.* at 678.

When the trial ended, the binders were left by the jurors in the jury box. The district judge instructed the parties to review the exhibits and to agree on which exhibits were to be sent to the jury for deliberations. The various defense counsel and the prosecutors spent the morning of June 9, 1987, reviewing the many exhibits that the parties intended to send into the jury room. There were ten boxes of exhibits—nine boxes of government exhibits and one box of defense exhibits—lined up on the front row spectator bench in the courtroom. Defense counsel claim that the prosecutor promised them that the binders were not going to be sent to the jury room. The prosecutor denies ever making such a promise. *See* Affidavit of Prosecutor at 7. After resolving some minor issues regarding one or two of the exhibits, the judge directed that the exhibits entering the jury room be placed in the custody of the United States Marshal. Defense counsel then left the courtroom and the judge turned to other business. The prosecutor and the case agent from the FBI began loading all the exhibits, including the binders, onto a cart that the marshal wheeled into the jury room.

After the jury had been deliberating for four days, one of the defense counsel learned that the binders had been sent into the jury room and moved for a mistrial. *See* Trial Trans. at 5986. Defense counsel argued that the submission of the binders to the jury during deliberations consti-

tuted reversible error. The binders were, counsel argued, merely roadmaps to conviction, highlighting the key exhibits of the government's case. Moreover, these binders were sent to the jury room with neither the knowledge nor consent of the defendants. The district court denied the motion. *See* Trial Trans. at 5990, 5999, 6029. However, because the government agreed to defense counsel's request to have the binders removed, the binders were removed from the jury room after the jurors were dismissed for the weekend. *See* Trial Trans. at 5997-98, 6007.[1]

---

[1] The panel seemed to attach significance to the district court's decision to remove the binders from the jury room once the defendants raised their objections. *See Best*, 913 F.2d at 1183. We find that significance unwarranted. The transcript of the district court proceedings plainly reveals that the court had the binders removed not because it found their presence in error, but because the parties stipulated to their removal:

> Defense Counsel: Judge, . . . we are going to also move that at the recess, whenever we break and the jury is excused for the weekend, that those jury books [i.e. the binders] be collected, taken out of the jury room, and that the jury not be permitted to look at those jury books for the remainder of their deliberation, because they have the exhibits and they can look at the exhibits . . . .
>
> The Court: Any objection to that?
>
> Prosecutor: I have no objection to that.
>
> The Court: Fine. Okay. * * * So stipulated. Okay, we'll sneak in there after they [i.e. the jurors] leave without letting them know. * * * Let the record show that pursuant to agreement of counsel, without waiving any defendant's rights to a claim of error because of the jury books going back with the evidence, the court has ordered the court room deputy to remove those twelve jury books from the jury room . . . .

Trial Trans. at 5997-98, 6007.

Later, when ruling on the defendants' post-trial motions, the district court made clear that the removal of the binders did not constitute a finding of error, or, for that matter, any other finding. It was simply a stipulated compromise that was struck between the parties:

(Footnote continued on following page)

On the following Monday, the jurors finished deliberating and returned the verdicts described above. There is no doubt that the jurors noticed the absence of the binders: on Monday morning, the foreperson asked about the missing binders and requested the return of various slips of paper upon which jurors made notes and which were placed inside the binders. The district court chose not to respond to the jurors' request, and approximately four hours later, the jury came in with its verdicts. Following the verdicts, the district court agreed to conduct an examination of each juror to determine whether he had used the binders to the exclusion of all the original exhibits admitted in evidence. Each juror stated that he used the binders only in conjunction with the original exhibits during the deliberations. Every juror remarked that they had examined the other exhibits in the jury room. *See* Trial Trans. at 6195-6215.

Regardless of the jurors' statements about considering all the evidence, the defendants filed a joint post-trial motion for a new trial based on the prejudicial impact of the binders on jury deliberations and the alleged misconduct by the government. Defense counsel argued that they had been misled by the prosecution regarding what was to be sent to the jury room and that the presence of the binders in the jury room had contaminated the jurors' deliberations. Prior to sentencing the defendants, the district court heard argument from the parties on the post-

---

[1] *continued*

> Defense Counsel: [I]t wasn't until Friday afternoon, late in the afternoon, that we discovered that those jury books went back there. And when we made our record, your Honor ruled that the jury books should come out. And what was the first thing—
>
> The Court: I think that was a compromise position after we discussed it . . . . * * * But rather than a ruling, I think it was a compromise position. The government had no objection to removing them at that time. But at any rate . . . the transcript will reflect that.

Trial Trans. at 6150.

trial motion. At that time, both parties were prepared to give sworn testimony regarding the defendants' allegations. But they didn't get the chance: the district court declined to hold a hearing on the issue of government misconduct, finding that the issue was mooted by the fact that all the exhibits contained in the binders had been admitted properly in evidence during the trial, and thus, no harm was done by their presence in the jury room. *See* Trial Trans. at 6272. The district court specifically added that it was *not* finding that the government intentionally deposited the binders in the jury room to prejudice the defendants. *See* Trial Trans. at 6188-89. The district court accordingly denied the defendants' motion for a new trial and proceeded with sentencing.

III.

On appeal, the defendants renew their arguments that the prosecutor's misconduct in sending the binders into the jury room prejudiced the defendants and, thereby, deprived them of a fair trial. We need only reach the misconduct issue, however, if the defendants establish that there was some prejudice or substantial right affected by the presence of the binders in the jury room during deliberations, and that the district court abused its discretion by refusing to hold an evidentiary hearing on that alleged misconduct. *See United States v. Wilson*, 715 F.2d 1164, 1169 (7th Cir.), *cert. denied*, 464 U.S. 986 (1983). Thus, first—and, as we shall see, the only—issue we face is whether the district court acted reasonably in refusing to set aside the verdict because it found no possible prejudice. *See United States v. Bruscino*, 687 F.2d 939, 940 (7th Cir. 1982) ("The proper standard of appellate review . . . is whether the district court abused its discretion in denying defendant's motion for a new trial.") (quotations omitted). We note that, under the abuse of discretion standard, the proper inquiry "is not how the reviewing court would have ruled if it had been considering the case in the first place, but rather whether any reasonable person could

agree with the district court." *Graefenhain v. Pabst Brewing Co.*, 870 F.2d 1198, 1201 (7th Cir. 1989) (quoting *United States v. $103,387.27 in U.S. Currency*, 863 F.2d 555, 561 (7th Cir. 1988)).

In *Bruscino*, we faced a similar question. In that case, the two defendants, inmates at a federal penitentiary, were charged with the murder of another inmate. The defendants argued that their convictions were unlawful because the jury had been exposed to two documents not in evidence—specifically, a Bureau of Prisons report and a newspaper article. The report suggested that one of the defendants was involved with the "Mexican Mafia," and the article related that all of the individuals who had been indicted for the murder had pleaded guilty, except the two defendants. We held that the district court did not abuse its discretion in concluding that it was highly unlikely that the jury had been prejudiced by the documents in question. Therefore, we affirmed the convictions. Given the wealth of admitted evidence against the two defendants, we found the challenged documents "drably descriptive," telling the jury "nothing it did not already know," and thus insufficient to justify reversing the convictions. *See Bruscino*, 687 F.2d at 942.

The instant case presents an even stronger argument for affirming the convictions of Best, Bewick, and Conarty. In *Bruscino*, the challenged documents were not admitted in evidence; therefore, it was error for the jury to see such documents. *See Id.* at 940 ("A criminal defendant in our system has a right to be tried on the basis of the evidence admitted at his trial, and this right may be violated if the jury gets access to extra-record evidence . . . ."). Thus, the question in *Bruscino* was whether the district court abused its discretion in concluding that that error had not prejudiced the jury. But in the present appeal, all parties agree that the jury properly could review the exhibits contained in the binders—after all, they openly had been examining those binders, document by document, in the course of the seven-week trial, and by the end of the trial, every document in the binder had been

admitted in evidence. Thus, it simply could not have been error for the jury to see the exhibits contained in the binders.

The only contention of prejudice is that the use of the binders during deliberations made it easier for the jurors to follow the government's case, and that the jurors might have taken the absence of any binders provided by the defendants as an indication that the defense agreed that the government's binders contained all the relevant evidence. *See Best*, 913 F.2d at 1184. This argument ignores the fact that the binders contained only copies of documents admitted in evidence; the original exhibits, both the government and the defense documents, were carefully organized in boxes that were just as easily accessible to the jury. The binders were no more "roadmaps to conviction" than were the ten boxes of carefully ordered evidence.

Even if we accept the argument that the binders permitted greater access to the government exhibits, we nevertheless fail to see how easy access by itself amounts to error. If the defendants objected to the ease of access which the binders provided, the time to object was when the binders were first distributed to the jury in the opening days of the trial. Not only did they fail to object, but the record reveals that during the trial the defendants themselves frequently directed the jury's attention to the binders in order to focus the jurors on a particular document or transaction. As the district court appropriately ruled, once it was determined that the documents in the binders properly were admitted in evidence, and considering the fact that the binders had been on the jurors' laps for seven weeks, there can be no issue of prejudice:

> The Court: Well, I think, here again, it would be a serious issue, obviously, and I would declare a mistrial at the snap of a finger in the event the jury did not have that jury book [i.e. binder] on their laps for almost two months, and, also, if, indeed, the exhibits appearing in the jury book were not exhibits actually received in evidence. I'd have no problem

> with it. I don't think it is a proper reaction for the court to declare a mistrial just because this evidence has been compiled in one jury book.

Trial Trans. at 6038-39.

The cases upon which the defendants and the panel's opinion rely easily are distinguishable. In each of these cases involving the jury's exposure to "unauthorized" materials during deliberations, the materials in question were not properly admitted in evidence. Indeed, the three main cases cited by the defendants, *United States v. Brown*, 451 F.2d 1231 (5th Cir. 1976); *Sanchez v. United States*, 293 F.2d 260 (8th Cir. 1961); and *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957), all involved situations in which federal agents in narcotics cases had handwritten on the envelopes that contained the narcotics the time, date, and place of the defendant's sale of the drugs, as well as the results of the laboratory analysis including the drugs' purity and amount. The courts in those case, observing that the notes were profoundly detailed, concluded that the labels on the envelopes amounted to a "neat condensation" of the government's case on each sale. *Brown*, 451 F.2d at 1234; *Sanchez*, 293 F.2d at 269; *Ware*, 247 F.2d at 700. The important distinction here is that, unlike the documents in the binders in the present case, the labels in *Brown*, *Ware*, and *Sanchez* had not been admitted properly in evidence.

Even in more recent cases in which we have held that unauthorized materials in the jury room did *not* require a mistrial, we still focused on whether the materials in issue had been admitted in evidence. *See United States v. Herrero*, 893 F.2d 1512, 1539-41 (7th Cir.), *cert. denied*, 110 S. Ct. 2623 (1990) (presence of map in the jury room not in evidence did not require mistrial); *United States v. Sababu*, 891 F.2d 1308, 1332-34 (7th Cir. 1989) (presence of transcript from telephone conversation previously excluded from evidence in the jury room did not violate defendant's constitutional rights); *United States v. Key*, 859 F.2d 1257, 1264 (7th Cir. 1988) (debtor not entitled to new

trial because there was no reasonable probability that evidence that debtor's husband had been convicted of tax evasion, which one juror learned from an outside source and communicated the information to another juror, had affected the jury's verdict); *United States v. Weisman*, 736 F.2d 421, 424 (7th Cir.), (one juror's bringing into the jury room a newspaper clipping that referred to the co-defendant's guilty plea was harmless and did not warrant new trial) *cert. denied*, 469 U.S. 983 (1984). If exposure to such improper evidence did not warrant a new trial is these cases, the jury's exposure in this case to copies of documents *properly admitted in evidence* in a binder that the jury had used for the length of the trial cannot warrant a new trial.

Moreover, the district court did not simply rely on the fact that the documents had been admitted in evidence. The court also verified, through individual voir dire of each juror, that the jurors considered all the evidence, not just the binders, in arriving at their verdicts. *See* Trial Trans. at 6275-76. Given this support, the district court's denial of the defendants' motion for mistrial was not an abuse of discretion. As we declared in *Bruscino*:

> The trial judge will always be in a better position than the appellate judges to assess the probable reactions of jurors in a case over which he has presided . . . . As we cannot put ourselves in the district judge's shoes in these matters we ought to accept his judgment unless we have a very strong conviction of error.

687 F.2d at 941. Here, the district court found no error resulting from the presence of the binders in the jury room during the deliberations. The record competently supports such a finding.[2]

---

[2] The dissent maintains the position that the presence of the binders in the jury room constituted error—that they were "unauthorized materials." But the materials *were* authorized—were in fact

(Footnote continued on following page)

Because we determine that the district court did not abuse its discretion, we need not even address the defendants' charges of prosecutorial misconduct. Simply put, if there was no error in the jurors' use of the binders during deliberations, then *how* the jurors came to have the binders in the jury room is immaterial. The district court felt similarly, as it refused to hold an evidentiary hearing regarding possible government misconduct: "There is no need for any additional hearing. I think it is mooted out.

---

[2] *continued*

in the possession of and perused by the jurors for nearly seven weeks. The agreement or acquiescence in their use by the defendants is simply not material to the issue of whether they were admissible pieces of evidence—and each piece of the material in the binders *was* in evidence.

The dissent also suggests that the immediate agreement of the government to withdraw the binders is somehow an admission that they were wrongfully there. Not so. It is simply an acknowledgement that it didn't make the slightest difference. With or without the binders, the exhibits were in the jury room. So rather than fight over the program, take the binders out. (It is interesting that when these binders—these "road maps to guilt"—were in the jury room, they deliberated four days without result; four hours after their removal, the jurors found their own road map and returned a guilty verdict. Speculation on jury process is a futile pastime at best but since the subject was raised, why not?)

The dissent also complains that the post-trial questioning of the jurors was inadequate because the only thing the court asked was whether they had used the binders "to the exclusion of the original exhibits." This is not so. What the court asked was whether they had used the binders to the *exclusion* of the other *exhibits*—government and defendant. *See* Trial Trans. at 6196. The answer to this question was negative. That was the *only* issue raised by the defense. Any further inquiry would have been an inquiry as to how the jurors arrived at their verdict. That inquiry is clearly improper unless there is an allegation that something *not* admitted in evidence was in the jury room or some improper communication had occurred. *See* Fed. R. Evid. 606(b). *See generally* J. Haddad, J. Zagel, G. Starkman & W. Bauer, *Cases and Comments on Criminal Procedure*, 1461-62 (3d ed. 1987). Neither of these facts were alleged or were true. The court simply put to rest a stated fear of the defense counsel.

The only concern this court had was the jury might have had with them during their deliberations exhibits which were not admitted in evidence." Trial Trans. at 6272.

Thus, although the record contains the conflicting affidavits of the prosecutor and the defense counsel, the district court declined to resolve these disputes. With no record to guide us, we refuse to "find facts" on appeal.[3] *See United States v. Rodriques*, 888 F.2d 519, 525 (7th Cir. 1989). *See also Mars Steel Corp. v. Continental Bank*, 880 F.2d 928 (7th Cir. 1989) (*en banc*). Instead, we hold that the district court's refusal to entertain an evidentiary hearing concerning the defendants' charges of prosecutorial misconduct was not an abuse of discretion. *See Wilson*, 715 F.2d at 1169 (finding no abuse of discretion when the district court denied an evidentiary hearing on the defendants' claim that the government leaked information to the press, which resulted in prejudicial pretrial publicity, where there was no evidence that the pretrial publicity adversely affected the rights of the defendants.). As the panel rejected the defendants' other contentions, we do so as well, relying on the panel's brief discussion. *See Best*, 913 F.2d at 1180-82, 1185.

IV.

For the reasons discussed above, the judgments of conviction are

AFFIRMED.

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[3] On this question, we note that the findings of the original panel in this case that suggested that Assistant United States Attorney Susan Bogart, the lead prosecutor in this case, had "quite possibly" engaged in misconduct have been vacated. Had the district court believed an inquiry into Ms. Bogart's conduct warranted, it could have conducted one; we should not perform that task in its stead.

POSNER, *Circuit Judge*, with whom CUMMINGS, CUDAHY, EASTERBROOK, and RIPPLE, *Circuit Judges*, join, dissenting. As a result of the introduction by the prosecutor of unauthorized materials into the jury room, and the trial judge's failure to apply the correct legal standard in determining whether that introduction had prejudiced the jury's deliberations, the three defendants were improperly convicted, and are entitled, as the panel unanimously found, to a new trial. Although there was adequate evidence of the defendants' guilt, it was a close case, and defendant Conarty in particular might well have been acquitted but for the business with the binders.

At the beginning of this seven-week trial of a complicated financial fraud, the government, with the judge's permission, supplied each juror with a loose-leaf binder containing the key government exhibits, arranged by transaction, to assist the jury in following the evidence. Because the exhibits in the binders had not yet been placed in evidence, the judge told the jurors not to look in the binders until a particular exhibit was admitted into evidence, and then to look only at that exhibit. He also told them to leave the binders in the jury box during recesses. When the trial ended and the jury left the box, the binders were still there, lying on the floor beside each juror's seat; several spare binders were also lying on the floor. The original exhibits were in ten boxes, nine containing the government's exhibits and one the defendants'. (The defendants had not supplied the jurors with copies, bound or otherwise, of their exhibits, so the only defendants' exhibits that the jurors had seen or would ever see were the original exhibits.) At this time the defendants' lawyers, according to affidavits they submitted, had a brief discussion with the prosecutor about which exhibits would go to the jury room, and it was agreed that only the ten boxes of original exhibits would go, together with some charts summarizing parts of the evidence—not the government's binders.

The defendants' lawyers then left the courtroom, and the judge turned to his motion call. The prosecutor was

still in the courtroom. In her presence an FBI agent who had assisted in the prosecution loaded both the ten boxes of original exhibits, which had been lying on the first-row spectators' bench, *and* the government's binders, onto a cart that the marshal then wheeled into the jury room. The prosecutor denies having told the defendants' lawyers that the binders would not be going to the jury room, but she did not make this denial in an affidavit under oath, as the defendants' lawyers had done with their version of the conversation. According to the FBI agent's "affidavit," which was also unsworn, the prosecutor actually helped him load the binders onto the cart. The district judge made no finding as to who was telling the truth, so for purposes of this appeal we must (even if we disregard the prosecution's unexplained failure to execute proper affidavits) assume that the binders were sent to the jury without the consent or acquiescence of the defendants' lawyers.

A chance remark by the marshal to one of the defense lawyers that the jury room was getting messy with all the exhibits *and books* lying around revealed, after the jury had been deliberating for four days, that the binders were in the jury room. The defense immediately protested to the judge, moved for a mistrial, and demanded that the binders be withdrawn from the jury room as soon as the jury broke for the weekend. The prosecutor made no objection to that demand. The judge waited until the jury had left and then had the binders withdrawn and sealed in a garbage bag together with yellow sheets of paper, which had been inserted in the binders, on which the jurors had made notes.

The jurors had been told nothing about the *contretemps* over the binders, but when they arrived Monday morning to resume their deliberations they immediately noticed that the binders were gone. The jury foreman went to the judge's chambers and told the judge's secretaries that the binders had disappeared and that he was afraid that someone had broken into the jury room and stolen them. He was given no explanation for the disappearance of the

binders, or of the jurors' notes that disappeared with them. Those notes, by the way, were *all* the notes the jurors had made during their deliberations to date. For, concerned lest the cleaning staff or other building personnel read the notes, the jurors had adopted the practice of tucking all their notes into the government binders at the end of each day's deliberations.

The jury resumed its deliberations and four hours later brought in its verdict. The judge then summoned the jurors to his chambers one by one and in the presence of the lawyers asked the jurors whether they had used the binders in their deliberations to the exclusion of the original exhibits. Their answers (which were brief, and there were virtually no follow-up questions) indicated, first, that they had indeed used the binders in their deliberations—and not just as a place for storing notes. One juror said, "the book [i.e., the government binder] was always in front of me." But they had not used them to the exclusion of the original exhibits. One juror said, "we were in and out of all those boxes"; another, "one person would go through the file [in the boxes of original exhibits], and just grab whatever piece of evidence we were trying to look for. The other members of the jury would then look in the jury book if it was listed in the jury book." A third juror said, "after you withdrew the books [i.e., the government binders]"—for the judge had now told the jurors that the binders had been withdrawn at his direction rather than just having mysteriously disappeared—"we went back to the original exhibits." The judge then denied the defendants' motion for a mistrial.

Both the district court and this court make much of the fact that all the exhibits in the government's binders had been admitted into evidence. That cannot be the end of our inquiry. If the prosecutor had entered the jury room during the jurors' deliberations and told the jurors that if they examined the original exhibits in the following sequence it would help them to understand the defendants' guilt, no judge would think that the fact that all the exhibits were in evidence would save the conviction. Instead

of visiting the jury room in person the prosecutor sent into it a roadmap to a guilty verdict, in the form of suggestively sequenced selections from nine boxes of government exhibits, for the jurors to use in their deliberations. The ordering of familiar materials is a form of creativity recognized in law: you can copyright a compilation of materials that are in the public domain. And you can convict a man by a tendentious compilation of exhibits already in evidence.

The district judge brushed aside this concern after satisfying himself that the jurors had looked at the original exhibits as well as the government binders. Our court now goes him one better by holding that the judge's initial permission to the government to give the exhibit binders to the jury was permission that the jury could use them in its deliberations. The judge obviously didn't think he had given the broader permission. If he had, he would not have summoned the jurors to his chambers and quizzed them on the use they had made of the binders and of the original exhibits. He did this because it was only through a slip-up that the binders had found their way into the jury room. Why else was the prosecutor so quick to stipulate with the defendants' lawyers for the withdrawal of the binders from the jury room in the midst of the jury's deliberations? That withdrawal made sense only as an effort to rectify an error. Otherwise it would have been a gratuitous interference with the orderly deliberations of the jury. For remember that along with the binders were removed—also without any explanation—all of the jurors' notes. Remember also that the jurors completed their deliberations under the impression that someone might have broken into the jury room and stolen the binders and notes. How could this deformation of the jury's deliberations have made any sense if the binders were *properly* in the jury room?

I said that you can convict a man with a tendentious compilation of evidence. I will illustrate with Conarty. Best and Bewick, Conarty's two codefendants, were, respectively, the top man and the second in command at

a savings and loan association. They were charged with approving a number of improper loans, but Conarty, the association's in-house counsel, was charged in connection with only one of these transactions, the Kings Point loan. It was a loan to a partnership, but two of the three partners were ineligible to borrow from the bank. One of them, Henning, was in bankruptcy. This much Conarty undeniably knew because he was one of Henning's creditors and had filed a claim in the bankruptcy proceeding. Another partner, Andreuccetti, also was uncreditworthy, although there is no evidence that Conarty knew this. At the closing, some of the loan moneys were paid directly to Henning, who then cut a check to Conarty that paid off Henning's indebtedness to him in full. Pernice, the third borrowing partner, also used a portion of the loan moneys to pay a preexisting debt to Conarty. Conarty received a total of $13,000 at the closing. The loan was improper, and if Conarty knew this he was guilty of fraud. There was circumstantial evidence—not least the use of a part of the loan to pay off unrelated debts to him—that he did know. But it was a close case. One reason Judge Bua gave for not quizzing the jurors about the binders before the jury completed its deliberations was that the issue would be moot if the jury returned verdicts of not guilty. In his words, "there's a chance, and I see it quite possible, that Mr. Conarty's case could very well go not guilty."

The government binders made it easy for the jury to infer Conarty's guilty knowledge, because they grouped all the documents relevant to the Kings Point transaction under one tab, which the boxes of original exhibits did not do. There were the checks cut to Conarty right alongside the loan documents themselves. In fact the checks were located in the binder directly after Andreucetti's unimpressive financial statement, demonstrating his lack of creditworthiness, even though there was no evidence that Conarty (who was not a member of the savings and loan association's loan committee) had ever seen the statement, or for that matter the loan documents. It was a suggestive juxtaposition.

The utility of the binders as a guide to guilt was enhanced by the fact that there were so many of them—sixteen or seventeen: one for each juror, with several extras. There were of course no defense exhibits in them. If the jurors wanted to look at defense exhibits they had to go to the original exhibits, which contained one box of defense exhibits: one box, for twelve jurors.

There is nothing wrong with a party's placing its key exhibits in binders for the jurors to use during their deliberations, as well as during the trial itself. But of course the other party is entitled to notice that this is going to be done. If the defendants' lawyers had known that the jury would have the government's binders in the jury room, they might have supplied their own binders to the jury, with their own ordering of exhibits, and they might have objected to the selection and arrangement of the exhibits in the government's binders. They had no opportunity to do these things. The fact that the jury had the government's binders and no binders from the defendants was calculated to enhance the authority of the government's binders in the jurors' eyes and to validate the suggestive order in which the exhibits were arranged in those binders. Note that when questioned by the judge, the jurors referred to the government binders not as a government compilation but simply as "the jury book." So, as a matter of fact, did the judge.

The district court's lack of control over what went to the jury room, the prosecutor's and the FBI agent's failures (unexplained to this day) to attest their affidavits, the prosecutor's opposition to an evidentiary hearing to clear up the issue of responsibility for the binders' having found their way into the jury room, the disrespect shown the jurors by the spiriting away of the binders and especially of all their notes without any explanation—all these are deeply regrettable features of this case, and in fact embarrassments to federal justice. But we cannot reverse the convictions unless there was a "reasonable possibility" that the presence in the jury room of unauthorized materials affected the jury's verdict. *United States*

v. Bruscino, 687 F.2d 938, 940 (7th Cir. 1982) (en banc). That is a judgment to be made in the first instance by the trial judge, who having observed the jury during the trial is in a better position than we to gauge the probable impact of the unauthorized materials on the outcome. Our review of his judgment is therefore deferential, which explains the cases such as *United States v. Wiseman*, 736 F.2d 421 (7th Cir. 1984), cited in the majority opinion, in which we and other courts of appeals have affirmed refusals by district judges to grant a mistrial on the basis of the introduction of unauthorized materials into the jury room *when the judge had framed the inquiry relevant to his exercise of discretionary judgment in a proper and responsible fashion. Id.* at 426. In this case he did not. He asked the jurors whether they had consulted the original exhibits as well as the binders, and when they said they had he denied the motion for a mistrial. He asked the wrong question. It is the rare case of introducing unauthorized materials into the jury room in which the jury looks *only* at those materials. That cannot be the decisive consideration. Nor the fact that the exhibits in the binders were in evidence (and in fact when the judge denied the mistrial right after interviewing the jurors, there was an open question whether all the exhibits really had been admitted into evidence). The binders—Ariadne's thread through the maze constituted by the ten boxes of original exhibits—were not in evidence.

The rule that precludes inquiry into the reasoning process by which a jury reached its verdict does not preclude inquiry into the prejudicial impact of extraneous information on the jury's deliberations. Fed. R. Evid. 606(b). The judge should have inquired into the effect on the jury's deliberations of the order of exhibits in the government binders—for example, had the jurors assumed that Conarty had seen Andreucetti's financial statement and the other documents for the Kings Point loan? On the basis of such inquiry, plus an evaluation of the strength of the evidence against Conarty and the other defendants, the judge could have made an informed and responsible de-

cision as to whether there was a reasonable possibility that the use of the binders in the jury's deliberations had changed the outcome of the case—and we would be bound by that decision. The judge's perfunctory and loaded inquiry (e.g., "Did you use the jury book to the exclusion of all the other exhibits and evidence you heard in the case?") suggests more than anything else a determination not to have to sit through another seven-week trial.

Ordinarily when a district judge has failed to exercise the discretion that is his the remedy is a remand to enable him to exercise it. That is not feasible here. The jurors are scattered to the winds and can no longer be questioned about the impact of the binders, and the judge has committed himself to the view that the binders did no harm. The bell cannot be unrung. The defendants are entitled to a new trial.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: August 5, 1991

BEFORE:

Honorable William J. Bauer, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable Harlington Wood, Jr., Circuit Judge
Honorable Richard D. Cudahy, Circuit Judge
Honorable Richard A. Posner, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

Nos. 87-2456, 87-2457 and 87-2458

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOHN C. BEST, GREGORY J. BEWICK and
PAUL F. CONARTY,

Defendants-Appellants

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 86 CR 442, Judge Nicholas J. Bua

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 87-2456, 87-2457, 87-2458

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN C. BEST, GREGORY J. BEWICK, and
PAUL F. CONARTY,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 86 CR 442—**Nicholas J. Bua**, *Judge*

ARGUED APRIL 5, 1990—DECIDED JULY 3, 1990

Before CUMMINGS, POSNER, and RIPPLE, *Circuit Judges.*

POSNER, *Circuit Judge.* The defendants were indicted on 35 counts of mail fraud, misapplication of bank funds, bank fraud, and related crimes committed in the course of the failure of the American Heritage Savings and Loan Association, a federally insured institution of which the defendants were officers. The trial lasted seven weeks, and the jury found the defendants guilty on most counts. The judge sentenced John Best to a year and a day in prison, Gregory Bewick to six months on work release, and Paul Conarty to probation.

American Heritage failed in 1983. Best was its chief executive officer, Bewick its second in command, and Conarty, a recent addition, its in-house counsel. The bank (as we shall call it, for though it was really a savings and loan association nothing in this case turns on the differences between the two types of banking institution) had been in a parlous state since 1981. It is the efforts of Best and Bewick, later joined by Conarty, to stave off the evil day that gave rise to this prosecution.

Through Landfinder's Realty Corporation and other wholly owned subsidiaries, the bank owned a great deal of unpromising commercial real estate, mainly undeveloped, on which the defendants' efforts to disguise the bank's deteriorating financial condition focused. Among many practices in which Best and Bewick engaged that violated the norms of the banking business, they would approve the making of loans that were conditioned on the borrower's agreeing to buy real estate from one of the bank's subsidiaries, and would then apply to the down payment for the purchase of the real estate so much of the loan as was necessary to cover the down payment completely. By this tactic, they were, in effect, selling the bank's real estate to the borrower—who typically was uncreditworthy, and known to Best and Bewick to be so—for no cash down. Selling it, moreover, at inflated prices, based on inflated appraisals, so that the bank could book a profit on the sales and thereby improve its balance sheet, even though it was extremely unlikely that the borrower-buyer would ever complete the payments for the property or that, if he did not, the property could be sold for a price equal to the purchase price, or for that matter equal to the loan. While engaging in these reckless transactions, which predictably flopped, and while the bank was losing money hand over fist, Best and Bewick were paying themselves large bonuses from the Landfinder's account.

The evidence was ample to convict Best and Bewick of the offenses with which they were charged, with the possible exception of the counts relating to the payment of

bonuses from the Landfinder's account. The source of Landfinder's revenue, it is true, was not really the proceeds of the sale of real estate owned by Landfinder's and other nonbanking real estate subsidiaries of the bank, because the purchasers paid nothing for the real estate—the sales generated no proceeds. The actual source of the real estate subsidiaries' revenue, and hence of the bonuses, was the bank funds that Best and Bewick loaned to the purchasers of the real estate and then applied to the down payment on the sales. Bank funds thus trickled back to Best and Bewick from Landfinder's, having been, in effect, lightly laundered. It is a crime for an officer of a bank to receive money from a bank transaction with intent to defraud the bank, 18 U.S.C. § 1006, and the officer must not be allowed to evade this prohibition by laundering the money. *United States v. Payne*, 750 F.2d 844, 858 (11th Cir. 1985). Such receipt is also a violation of 18 U.S.C. § 657, which forbids the willful misapplication of bank funds. *United States v. Bailey*, 859 F.2d 1265, 1278-82 (7th Cir. 1988); *United States v. Olson*, 825 F.2d 121, 123 (7th Cir. 1987); *United States v. Bruun*, 809 F.2d 397, 408 (7th Cir. 1987); *United States v. Angelos*, 763 F.2d 859, 862 (7th Cir. 1985). The defendants were convicted under both statutes, as well as for mail fraud.

But we have ignored an important background fact. Long before American Heritage got into financial trouble, its officers were paid their bonuses—with the full knowledge and acquiescence of the pertinent state and federal banking authorities—from the Landfinder's account rather than from bank funds directly. Landfinder's was in a higher tax bracket than the bank, so that, treating the bank and its subsidiaries as a single enterprise (which realistically they were, since the subsidiaries were wholly owned), the after-tax costs of the bonuses were minimized by having Landfinder's pay them and deduct the expense from its income. It is not bank fraud to pay a bank's officers salaries and bonuses, even though the ultimate source of these moneys is—of course—the bank's funds; and for the reason just given there was nothing

fraudulent in the fact that in this case the bonuses were paid by an affiliated corporation rather than by the bank itself. It is true that during the period of the bank's decline, the bank stopped paying the bonuses from Landfinder's American Heritage bank account but instead opened an account for Landfinder's in another bank and paid the bonuses from that account. This is not necessarily fraudulent, however, in view of the defendants' testimony, contradicted by no other evidence, that this was done because employees of the bank resented the fact that the officers were drawing off large bonuses at a time when the bank was in financial trouble. Greed is not fraud.

What the government is left with is possible skepticism concerning the defendants' stated reason for taking the unusual step of opening a bank account for one of the bank's wholly owned subsidiaries in another and unrelated bank, plus understandable concern with the exorbitance of the defendants' bonuses in this period of decline, plus the color lent to the bonus arrangement by the abundant other evidence of fraud. We cannot say that no rational jury, confronted with this tapestry, could find Best and Bewick guilty beyond a reasonable doubt of defrauding the bank by paying themselves huge bonuses from Landfinder's new bank account.

Although Conarty had done some modest legal work for the bank while in private practice, he had no substantial involvement in the bank's affairs until he became its in-house counsel at the beginning of 1983. Six weeks later the Kings Point loan closed, the only transaction on which the charges against Conarty are founded. The loan was to be made to a partnership, but two of the three partners—Henning and Pernice—were ineligible to borrow from the bank, because they had reached their loan limit. Henning in addition was in bankruptcy; this much, at least, Conarty certainly knew, because he was one of Henning's creditors and had filed a claim in the bankruptcy proceeding. The third partner was Andreuccetti, and he too was uncreditworthy although there is no evidence that Conarty knew this. In a meeting of bank officers at which

Conarty was present, held before the closing, someone remarked that the loan would have to be made to Andreuccetti, because the other two partners were ineligible. So far as appears, Conarty said nothing at the meeting; nor is it known whether he heard the remark about the ineligibility of the other partners. At the closing, which Conarty handled for the bank, the checks for the part of the loan not earmarked for the down payment on the Kings Point property were made out to Henning and Pernice rather than to Andreuccetti. Henning then "cut" checks to Conarty that paid Henning's full indebtedness to him, thereby giving him a preference (as Conarty well knew) over Henning's other creditors, while Pernice also cut a check to Conarty to pay off a pre-existing debt for legal services.

The circumstances in which Conarty received payment for pre-existing debts from the loan nominally to Andreuccetti permit, although they do not compel, the government's characterization of the receipt as a kickback from a borrower to a bank officer—a clear violation of sections 657 and 1006. The loan was to enable the partnership of Henning, Pernice, and Andreuccetti to purchase and develop real estate owned by the bank, yet the proceeds were going to two of the partners to enable them to pay off pre-existing debts unrelated to the real estate project. This was a misuse of bank funds, and the jury was entitled to find that Conarty, a lawyer and bank officer, knew it. Nor was this all. At the same closing, Pernice cut a check to Best to pay a debt he owed him. The inference that Best and Conarty were being compensated for making a loan to uncreditworthy borrowers is hard to resist. The inference is strengthened by the fact that, since Henning was in bankruptcy, he was under no legal obligation to pay the face amount of his debt to Conarty; quite the contrary. The payment was not the discharge of an obligation, but—a rational jury could have found—compensation for Conarty's cooperation in the making of the bank loan to (in effect) Henning. The payment was over and above Conarty's compensation for handling the

loan, was substantial (a total of $13,000), and distinguishes his case from that of a secretary who types documents that may appear fishy, but who receives no additional compensation for doing so.

Although there was enough evidence to convict all three defendants of fraud, fraud was only one possible characterization of their conduct. Another was that they were honestly, though carelessly and indeed incompetently, trying to save the sinking bank, and compensating themselves no more than commensurately with their heroic if futile efforts. Obligated as we are, in evaluating the defendants' claim that they were entitled to be acquitted, to construe the evidence as favorably to the government as the record permits, we have presented a persuasive narrative of bank fraud. But the jury could, without taking leave of its senses, have construed the evidence more benignly. Because it was a close case the alleged trial errors take on greater importance than they would otherwise. We find only one error; but it is a beaut.

At the beginning of this protracted trial, the government with the judge's permission furnished each juror with a loose-leaf binder containing the key government exhibits arranged by transaction, to assist the jury in following the evidence. Because the exhibits in the binders had not yet been placed in evidence, the judge told the jurors not to look in the binders until a particular exhibit was admitted into evidence, and then to look only at that exhibit in the binder. He also told them to leave the binders in the jury box during recesses. When the trial ended and the jury left the box, the binders were still there, lying on the floor beside each juror's seat; several spare binders were also lying on the floor. The original exhibits themselves were in ten boxes, nine containing the government's exhibits and one the defendant's. According to affidavits submitted by defense counsel, the prosecutor (Susan Bogart) and the various defense counsel had a brief discussion about which exhibits would go to the jury room and it was agreed that only the boxes of exhibits (and some charts summarizing evidence) would go. The defense

counsel then left the courtroom and the judge turned to his motion call. An FBI agent assisting in the prosecution, in the presence of the prosecutor, then loaded the exhibits from the first-row spectators' bench on which they had been lying—and the binders—onto a cart that the marshal then wheeled into the jury room. The prosecutor denies having told defense counsel that the binders would not be going to the jury room, but she did not make this denial in an affidavit under oath, as the defense counsel had done. According to the FBI agent's affidavit (unsworn), the prosecutor did not just stand there but actually helped him load the binders onto the cart.

When first asked by the judge how the binders had found their way into the jury room, the prosecutor said that they had been stacked on the bench with the other exhibits, implying that the defense counsel should have objected if they did not want the binders to go to the jury with the other materials on the bench (i.e., the exhibits). But the prosecutor's statement was contradicted by her own later affidavit—also inexplicably unsworn—as well as by the FBI agent's affidavit. It is almost certain that the binders were on the floor of the jury box, where they had been throughout the trial except when the jurors were actually looking at them, when defense counsel left the courtroom and the FBI agent and the prosecutor began loading the cart with materials for the jury room.

A chance remark by the marshal to one of the defense counsel to the effect that the jury room was getting messy with all the exhibits *and books* lying around revealed, after the jury had been deliberating for four days, that the binders were in the jury room. The defense immediately protested to the judge, who waited until the jury had gone home for the weekend and then ordered the binders withdrawn from the jury room. The jury was not told about this, and when it arrived in the jury room on Monday morning the jurors noticed the binders' absence. The foreman went to the judge's chambers and told the judge's secretaries that the binders had disappeared and that he was afraid someone had broken into the jury room

and stolen them. He was given no explanation for the disappearance of the binders.

The jury resumed its deliberations, and four hours later brought in its verdict. Afterward the judge summoned the jury to his chambers and in the presence of the lawyers questioned the jurors about the use they had made of the binders. The jurors acknowledged having used them in their deliberations but in response to a question by the judge denied having used them to the exclusion of the original exhibits. The judge then denied the defendants' motion for a mistrial, emphasizing not only that the jury had consulted the original exhibits as well as the government binders but also that all the exhibits in those binders were in evidence.

The judge's reaction when the presence of the binders in the jury room was discovered, coupled with the prosecutor's failure to submit a proper affidavit denying the allegations in the affidavits of the defense counsel, persuades us that in all likelihood the prosecutor dispatched the binders to the jury knowing that they were not supposed to go there. If this is indeed what happened, it was serious misconduct on her part—to which we are alerting both the Public Integrity Section of the Department of Justice and the Executive Committee of the United States District Court for the Northern District of Illinois—but, since with immaterial exceptions we do not reverse for harmless error, Fed. R. Crim. P. 52(a), it warrants a new trial only if there was a "reasonable possibility" that the presence of the unauthorized materials affected the jury's verdict. *United States v. Bruscino*, 687 F.2d 938, 940 (7th Cir. 1982) (en banc); *United States v. Sababu*, 891 F.2d 1308, 1333 (7th Cir. 1989); *United States v. Barnes*, 747 F.2d 246, 250-51 (4th Cir. 1984). The government argues that there was not, because every exhibit in the binders was in evidence and therefore merely duplicated an exhibit in one of the ten boxes of exhibits that were also in the jury room. We disagree with the argument although mindful that in most cases in which unauthorized materials find their way into the jury room the materials had not even been admitted

into evidence, as they were here, and that we review the trial judge's decision whether to set aside a verdict because of unauthorized materials in the jury room under the deferential "abuse of discretion" standard of appellate review. *United States v. Bruscino, supra*; *United States v. Andrews*, 895 F.2d 406, 408 (7th Cir. 1990); *United States v. Pinelli*, 890 F.2d 1461, 1473 (10th Cir. 1989).

The hundreds of documents in the ten boxes of original exhibits were arranged by transaction to some extent, but there were many more documents in each file of these exhibits than there were in the corresponding section of the government's binder, yet the section invariably contained all the *essential* documents and the file sometimes did not. For example, the section of the binder that was devoted to the Kings Point loan contained the checks to Best and Conarty, but the file on that loan in the exhibit boxes did not. The binders thus presented the evidence favorable to the government in a compact and also a convenient form. There was only one set of the original exhibits (the ten boxes' worth), which the twelve jurors thus had to share. But there were sixteen or seventeen binders—one for each juror, with some left over—each containing a relative handful of the government's exhibits. And those exhibits were sorted to make the theory of its case stand forth plainly. Thus, under Kings Point again, the key documents pointing to the defendants' guilt were arranged chronologically, so that, for example, Andreuccetti's unimpressive financial statement, demonstrating his lack of creditworthiness, was followed by the checks cut to Conarty. This juxtaposition was suggestive—indeed tendentious—since there was no evidence that Conarty had ever seen Andreuccetti's financial statement; Conarty was not a member of the loan committee, which had received the loan application with its supporting documents and had approved the loan.

There were, moreover, no defense exhibits in the binders. If the jurors wanted to look at defense exhibits they had to go to the box containing them: one box, for twelve jurors.

There is nothing in the least improper about a party's placing its key exhibits, or for that matter all its exhibits, in binders for the jurors to use during their deliberations, as well as during the trial itself. Some judges require the parties to do this in order to make it easier for the jury to read and refer to the exhibits. Far from being questionable, the practice is commendable. But it is improper for one party to do it when the other party has been led to understand that the binders will be used only to enable the jurors to look at a specific exhibit when it is introduced in evidence, and not to take with them to the jury room when they are deliberating. If defense counsel had known what use the jury would be permitted to make of the government's binders, it might have supplied its own binders to the jury, containing its own exhibits or its own ordering of both sides' exhibits; or it might have objected to the tendentious selection and arrangement of exhibits in the government's binders. Because of the prosecutor's carelessness or, quite possibly, her deceit, defense counsel were deprived of this opportunity.

The fact that all the exhibits in the binders were in evidence and therefore accessible, in principle anyway, to the jurors cannot be decisive. There is a difference between theoretical access and practical access. The fact that some piece of personal information about someone is lurking somewhere in the government's vast archives and data bases is not to be deemed a surrender of the person's right of privacy. *U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 109 S. Ct. 1468, 1476-80 (1989); *Thomas v. United States*, 890 F.2d 18, 21 (7th Cir. 1989). The situation here is less dramatic, as the ten boxes of exhibits were clearly labeled and each exhibit was in a clearly labeled manila folder; there was not a complete jumble. Nevertheless the exhibit books supplied by the government were immensely more convenient, and were in fact heavily used by the jurors. The very fact that the defense supplied no exhibit books of their own was calculated to give the government's books a certain authority in the minds of the jurors and to validate the suggestive

order in which the exhibits were marshaled in the books. The jury did not know, moreover, that the defense counsel were unaware that the government's binders were going to be sent into the jury room; the absence of defense binders might therefore have struck the jury as an admission that the government's binders contained all the relevant evidence, suitably ordered.

The furnishing of these binders to the jurors was, in the circumstances, a form of jury tampering—a subtle form, but perhaps not less effective because of its subtlety. The case is within the orbit of the decisions that find reversible error when documents summarizing the government's case find their way into the jury room. *United States v. Ware*, 247 F.2d 698, 700-01 (7th Cir. 1957); *Sanchez v. United States*, 293 F.2d 260, 267-69 (8th Cir. 1961); *United States v. Adams*, 385 F.2d 548 (2d Cir. 1967); *United States v. Brown*, 451 F.2d 1231, 1234 (5th Cir. 1971); *United States v. Pendas-Martinez*, 845 F.2d 938, 941 (11th Cir. 1988). Dictum in *United States v. Schuster*, 777 F.2d 264, 269-70 (5th Cir. 1985), discussing a factual situation much like the one in this case, provides further support for our conclusion, while *United States v. Davies*, 768 F.2d 893, 905 (7th Cir. 1985), illustrates a case on the other side of the line that we are trying to draw between the clearly harmless, and the potentially harmful, introduction by the government of unauthorized materials into the jury room.

If the able and experienced trial judge, on the basis of close observation of the jury during the seven-week trial, and a feel for the evidence that an appellate panel cannot duplicate, had furnished grounds for doubting that the government binders were likely to have affected the jury's deliberations, we would give great weight to his refusal to grant a mistrial. But he did not. The fact that the jury did not use the binders to the exclusion of the original exhibits has little significance, for this is ordinarily the case when unauthorized materials seep somehow into the jury room—the jury doesn't look *just* at those materials. The fact that everything in the binders was in evidence

is pertinent, but neither by itself nor in conjunction with the previous point can it be regarded as decisive on the issue of interference with the jury's deliberations.

This was a close case, and the government's misconduct may well have made a difference in the outcome, at least with regard to defendant Conarty, and to some of the counts against the other defendants as well. Compare *United States v. Wright-Barker*, 784 F.2d 161, 173-74 (3d Cir. 1986); *United States v. Warner*, 428 F.2d 730, 738 (8th Cir. 1970). The judgments must therefore be reversed, although the government can if it wishes retry the defendants. *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982).

The defendants raise a number of other issues, but they have no merit and require no discussion, except to note that the defendants' argument from *United States v. McNally*, 483 U.S. 350 (1987), is answered by our opinions in *United States v. Bailey*, *supra*, 859 F.2d at 1275-78, and *United States v. Cosentino*, 869 F.2d 301, 307 (7th Cir. 1989).

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: July 3, 1990

BEFORE:
Honorable Walter J. Cummings, Circuit Judge
Honorable Richard A. Posner, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge

Nos. 87-2456, 87-2457 and 87-2458

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOHN C. BEST, GREGORY J. BEWICK and PAUL F. CONARTY,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
No. 86 CR 442, Judge Nicholas J. Bua

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby, REVERSED and REMANDED, in accordance with the opinion of this Court filed this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America vs.
DEFENDANT
JOHN C. BEST

Docket No.
86 CR 442-1

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date August 28, 1987

COUNSEL

— *Without Counsel* However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

X *With Counsel* George P. Lynch

PLEA

— *Guilty*, and the court being satisfied that there is a factual basis for the plea.

— *Nolo Contendere*,

X *Not Guilty*

FINDING AND JUDGMENT

There being a verdict of

— *Not Guilty*, Defendant is discharged

X *Guilty*.

Defendant has been convicted as charged of the offense(s) of knowingly, wilfully and unlawfully conspiring to defraud an agency of the United States, causing mail to be delivered in furtherance of a scheme to defraud, misapplying

funds belonging to, receiving funds from a loan made by, and falsifying the true financial condition of the American Heritage Savings & Loan Assn., and conducting its affairs through a pattern of racketeering activity; In violation of Title 18 U.S.C. 371, 1341, 657, 1006, 1001 and 1962(c) as charged in superseding counts 1 to 20, 22 to 28, 30 to 31, and 33 to 35.

SENTENCE OR PROBATION ORDER

* * * * *

ONE (1) YEAR and ONE (1) DAY on superseding counts 1 to 20 and 35, to run concurrently with each other. Imposition of sentence on counts (superseding) 22 to 28, 30, 31, 33, and 34 is hereby suspended and the defendant placed on probation for a period of THREE (3) YEARS. Such period of probation to be consecutive to the term of imprisonment imposed on counts 1 to 20 and 35, and on condition that he comply with the general conditions of probation, and that he perform 500 hours of community service.

IT IS FURTHER ORDERED that the original indictment is dismissed on oral motion of the government.

* * * * *

/s/ Nicholas J. Bua
U.S. District Judge

Date August 28, 1987

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America vs.
DEFENDANT — Docket No.
GREGORY J. BEWICK — 86 CR 442-2

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date August 28, 1987

COUNSEL

__ *Without Counsel* However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

X *With Counsel* James S. Montana, Jr. and Susan G. Feibus

PLEA

__ *Guilty*, and the court being satisfied that there is a factual basis for the plea.

__ *Nolo Contendere*,

X *Not Guilty*

FINDING AND JUDGMENT

There being a verdict of

__ *Not Guilty*, Defendant is discharged

X *Guilty*.

Defendant has been convicted as charged of the offense(s) of knowingly, wilfully and unlawfully conspiring to defraud

an agency of the United States, causing mail to be delivered in furtherance of a scheme to defraud, misapplying funds belonging to, receiving funds from a loan made by, and falsifying the true financial condition of the American Heritage Savings & Loan Assn., and conducting its affairs through a pattern of racketeering activity; In violation of Title 18 U.S.C. 371, 1341, 657, 1006, 1001 and 1962(c) as charged in superseding counts 1 to 20, 22 to 28, 30, and 33 to 35.

* * * * *

SENTENCE OR PROBATION ORDER
SIX (6) MONTHS on counts 1 through 20, to run concurrently with each other. Defendant shall reside in and participate in the work release program of the Metropolitan Correctional Center. Imposition of sentence on counts 22 through 28, 30, 33, 34, and 35 is hereby suspended and the defendant placed on probation for a period of THREE (3) YEARS. Such period of probation to be consecutive to the term of imprisonment imposed on superseding counts 1 to 20, and on condition that he comply with the general conditions of probation and that he perform 500 hours of community service. The period of custody and probation is imposed on the superseding counts.

IT IS FURTHER ORDERED that the original indictment is dismissed on oral motion of the government.

/s/ Nicholas J. Bua
U.S. District Judge

Date August 28, 1987

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America vs.
DEFENDANT — Docket No.
PAUL F. CONARTY — 86 CR 442-3

JUDGMENT AND PROBATION/
COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date August 28, 1987

COUNSEL

__ *Without Counsel* However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel

X *With Counsel* Leland Shalgos

PLEA

__ *Guilty*, and the court being satisfied that there is a factual basis for the plea.

__ *Nolo Contendere*,

X *Not Guilty*

FINDING AND JUDGMENT

There being a verdict of

__ *Not Guilty*, Defendant is discharged
X *Guilty*.

Defendant has been convicted as charged of the offense(s) of knowingly, wilfully, and unlawfully causing mail to be delivered in furtherance of a scheme to defraud, misapply-

ing funds belonging to and receiving funds from a loan made by the American Heritage Savings & Loan Association;

In violation of Title 18, United States Code, Sections 1341, 657, and 1006, as charged in superseding counts 24, 28, 29, 30, 32, and 33.

* * * * *

SENTENCE OR PROBATION ORDER

IT IS ADJUDGED that on each of superseding counts 24, 28, 29, 30, 32, and 33 the defendant is placed on probation for a period of THREE (3) YEARS, on condition that he comply with the general conditions of probation and that he perform 400 hours of community service.

IT IS FURTHER ORDERED that the original indictment is dismissed on oral motion of the government.

/s/ Nicholas J. Bua
U.S. District Judge

Date August 28, 1987

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 CR 442-all Date: AUG 28 1987

Name of Assigned Judge: _____

Case Title: U.S. v. JOHN C. BEST et al

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Defendants' post-trial motions for judgment of acquittal, or in the alternative, for a new trial are hereby DENIED.

* * * * *

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 25, 1991

Before

Hon. William J. Bauer, Chief Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHN C. BEST, GREGORY J. BEWICK and PAUL F. CONARTY, Defendants-Appellants.	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division No. 86 CR 442 Nicholas J. Bua, *Judge*.
Nos. 87-2456, 87-2457, 87-2458	

ORDER

The petition for rehearng with suggestion for rehearing en banc in the above-entitled cause is GRANTED, the panel decision is VACATED, and the appeal is restored to the calendar for oral reargument before the full court at a date and time to be announced.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No.: 86 CR 442
	)	Judge Bua
JOHN C. BEST, GREGORY J. BEWICK and PAUL F. CONARTY,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT

James S. Montana, Jr., being duly sworn, deposes and says:

1. I am one of the attorneys for defendant Gregory J. Bewick. I have personal knowledge of all of the matters set forth in this affidavit and if called to testify at any hearing on this matter, I would testify consistently with this affidavit. I submit this affidavit in support of the motion of defendant Bewick to vacate the jury's verdict and to dismiss the indictment or, in the alternative, to grant a new trial because of prosecutorial misconduct in submitting the "jury books" to the jury during its deliberations without the consent, acquiescence or knowledge of defendant Bewick or his attorneys and contrary to the representations of Assistant U.S. Attorney Bogart who stated that the jury books would *not* go back to the jury. These jury books, (one for each juror), which were belatedly withdrawn from the jury's consideration after four full days of deliberation, consist of a selective compilation of government exhibits prepared by the government

in order to demonstrate the guilt of the defendants. The jury books do not contain all of the government's exhibits, but only a selected few; they do not contain any defense exhibits; and although the jury did use them during the course of the trial as a reference, the jury books themselves were never received in evidence. Further, the jury books which the jurors used in their deliberations contain two government exhibits, Government Exhibit Best 1A and 1B, which were never received in evidence, and one exhibit, Government Exhibit LH 3B, which is incomplete in that only the first page of what is obviously an exhibit of several pages is contained in the jury book.

2. The closing arguments to the jury were completed on June 8, 1987. After the arguments I approached Special F.B.I. Agent Michael Peters, the case agent who sat with and assisted Assistant United States Attorneys Hogan and Bogart during the entire trial and who also testified as a government witness to identify and authenticate the charts which allegedly summarized certain government exhibits.

3. At the time he was standing and leaning against the jury box. No one else was present during this discussion. I said to Agent Peters, "Well, you may win, but it will be close." Agent Peters replied, "You're right." Then he complimented me on my closing argument. He said, "It's the best one I've heard in this type of case." Then, he added, "I am worried about this one."

4. At the end of the day on June 8, 1987, after the completion of the arguments and the instructions to the jury, the Court ordered the parties to return the next day, June 9, 1987, at 8:45 a.m. to resolve any issues concerning the exhibits to be given to the jury for its deliberations.

5. The parties agreed to meet at 8:00 a.m. on June 9, 1987 in the courtroom to review the exhibits which each party proposed to submit to the jury for their review during deliberations.

6. During the evening of June 8, 1987 and the next morning on June 9, 1987, I expressed to Susan Feibus, my co-counsel, my concern that the government might attempt to have the jury books go back to the jury. I said that it would be highly improper and if they attempted to do so, we would object strenuously.

7. On June 9, 1987 at 8:00 a.m., as instructed by the Court, George Lynch, attorney for defendant Best, Leland Shalgos, attorney for defendant Connarty, Susan Feibus and I arrived at the courtroom. At that time the jury books were located in the jury box as they had been throughout the trial; there was one jury book in the vicinity of each juror's chair. Because the jury books were on the floor of the jury box next to the jurors' chairs, they could not be seen unless one leaned over the partition in front of the jury box to see what was on the floor.

8. Shortly after 8:00 a.m. Special Agent Peters arrived with the government's exhibits. There were approximately 10 boxes filled with government exhibits. Agent Peters unloaded the boxes in a row onto the first spectator bench on the right side of the courtroom as one faces the front of the courtroom. Mr. Lynch, Mr. Shalgos, Ms. Feibus and I began to review the government's exhibits. I asked Agent Peters if the boxes on the spectator bench which he had just unloaded were the exhibits the government intended to submit to the jury. He said they were. At no time did Agent Peters ever say to me, directly or indirectly, that the government intended to submit the jury books to the jury.

9. At approximately 8:20 a.m. Susan Bogart arrived. From 8:20 until Judge Bua came out on the bench, Mr. Lynch, Mr. Shalgos, Susan Feibus and I continued to review the government exhibits contained in the boxes on the first spectator bench. During that review we discovered several government exhibits which had blue or yellow sticker tabs attached to them; several which were highlighted with yellow ink; and several which related to subsequent litigation. Ms. Bogart agreed to have the blue and yellow sticker tabs removed; she agreed to have Agent Peters rexerox the exhibits which were highlighted with yellow ink; and she agreed to remove documents from the loan files which appeared to relate to subsequent litigation.

10. During this review I asked Ms. Bogart whether the boxes on the spectator bench contained all of the exhibits the government intended to go back to the jury. Ms. Bogart responded, "Yes, that's right and I would like everyone to review them so that there are no problems or questions later." At that time, the jury books were not on the spectator bench but were still in the jury box next to the jurors' chairs.

11. Also during this time Susan Feibus, my co-counsel, said to me, "I just asked her (Susan Bogart) if she intended that the jury books go back to the jury and she said 'no'." I said to Ms. Feibus, "Good, then we won't have to worry about it." When I had this discussion with Ms. Feibus I was seated at the defense counsel's table. No one else was present who could overhear this discussion.

12. Also during this time, Ms. Bogart reviewed the defense exhibits. The defense exhibits were on the first spectator bench on the left side of the courtroom as one faces the front of the courtroom. Defendant Bewick's exhibits were in manilla folders in a cardboard box marked

"Bewick Exhibits." During her review of Defendant Bewick's exhibits, Ms. Bogart noted that one of the exhibits was highlighted in orange ink. She pulled that exhibit and I agreed that it should be rexeroxed and that the recopied exhibit should be substituted for the highlighted exhibit. Ms. Bogart agreed to take the exhibit down to the 15th floor to rexerox it and to return it to the Court for insertion in the box of Bewick exhibits to go back to the jury.

13. The defense then completed its review of those exhibits which the government identified as being the exhibits it intended to go back to the jury. All of those exhibits were in boxes on the spectator bench. At no time did Ms. Bogart or Agent Peters ever state or imply to me that the jury books would be submitted to the jury.

14. In fact, in the presence of the defense attorneys Ms. Bogart or Agent Peters never placed the jury books on the spectator bench with the other government exhibits to be sent to the jury room for inspection by the defense, and Ms. Bogart specifically told Ms. Feibus that the jury books would not be sent to the jury.

15. At approximately 9:18 a.m., after the defense's review of the government exhibits and the government's review of the defense exhibits, Judge Bua came out on the bench. A partial transcript of what occurred at that point is attached hereto and made a part hereof as Exhibit A-1.

16. As of that point, the defense had reviewed the boxes of government exhibits on the first spectator bench to the right and Ms. Bogart had reviewed the defense exhibits on the first spectator bench to the left. Because I was satisfied that it was proper to allow those government exhibits in the boxes on the spectator bench to go back to the jury, I said to the Court:

"We're going through the exhibits. I don't think we're going to have any problems that we need to resort to the Court to, but I can't speak for everybody."

17. Mr. Lynch had an objection as to Government Exhibit LH-2D going to the jury. That government exhibit came out of one of the boxes on the spectator bench. A colloquy followed on the appropriateness of allowing this exhibit to go to the jury and the Court sustained the defense's objection.

18. Ms. Bogart then said:

"There are three documents here that have to be recopied because they have markings. If there is no further business, I was going to run down and just make clean copies of defense exhibits that were marked and then I'll be right back up.

19. The following significant colloquy then followed:

THE COURT: Are the government's exhibits segregated now?

MS. BOGART: Yes, Judge.

MR. MONTANA: Yes, your Honor. And they are . . .

THE COURT: Where? May I see them?

MR. MONTANA: And the defense exhibits, my exhibits, there are two charts plus documents in a separate box. So I don't know if the Marshall takes possession of those . . .

THE COURT: Yes, just put them on this desk here and the Marshall will make them available to the jury. Not, yet though, until Ms. Bogart brings up those documents.

MR. MONTANA: Okay.

THE COURT: But you can put them there. I just want to see them.

20. At the time the Court asked, "Are the government's exhibits segregated now?" and Ms. Bogart replied, "Yes Judge," all of the government exhibits *were* segregated and they were in the boxes lined up on the spectator bench. The jury books were not on the spectator bench but were in the jury box as they had been since they were first used by the jury. The jury books had never been tendered to the defense or segregated or identified in any way by the government as proposed materials to go back to the jury.

21. And when the Court asked where the government's exhibits had been segregated and asked to see them, I pointed to the boxes of government exhibits on the spectator bench.

22. Judge Bua then left the bench. I placed defendant Bewick's exhibits on the desk as instructed by Judge Bua. Ms. Bogart left to xerox the Bewick exhibits which had orange highlighter ink on it so that it could be placed in the Bewick exhibit box.

23. At that time there were no more questions to resolve as to what exhibits would go back to the jury. The defense had reviewed the exhibits which the government had proposed to submit to the jury which were lined up in boxes on the spectator bench. There was nothing more for the defense to do. There was nothing more for the government to do except take *those boxes* and place them on the desk to the right of Judge Bua for submission to the jury. The government had *not* placed the jury books on the spectator bench for review by the defense and Ms. Bogart had told Ms. Feibus that the government did not intend to ask that the jury books go to the jury.

24. Mr. Lynch, Mr. Shalgos, Ms. Feibus and I then left the courtroom because there was no more to do. The

government's exhibits were at that time in boxes lined up on the spectator bench awaiting removal to the desk to Judge Bua's right so that the U.S. Marshall could take them into the jury room. The jury books remained as they had been since 8:00 a.m. that morning; each one located in the vicinity of a juror's chair in the jury box. At the time I left, I was not concerned about any attempt by the government to submit the jury books to the jury for use during their deliberations for the following reasons:

a) The government had segregated those exhibits which it intended to sent to the jury on the spectator bench and the jury books were not among them.

b) Both Agent Peters and Ms. Bogart had told me that the boxes on the spectator bench were the only exhibits they intended to go to the jury;

c) At no time did Ms. Bogart or Agent Peters tell me that they intended to submit the jury books to the jury;

d) Ms. Feibus informed me that Ms. Bogart had in fact told her that the government did not intend to submit the jury books for the jury's consideration during deliberations;

e) Ms. Bogart represented to the Court that the government's exhibits had been segregated and at the time she made that representation the only government exhibits segregated were on the spectator bench and the jury books were *not* among them but were on the floor of the jury box out of everyone's view.

25. At no time did I or Ms. Feibus agree or consent to the jury books going back to the jury room. In fact, had the government proposed that, I intended to and would have objected strenuously because those books contained only a selection of government exhibits prepared by the government to demonstrate the defendants' guilt.

26. It is obvious that *after* the defense attorneys left the courtroom, without the consent or agreement of the defense, Ms. Bogart or Agent Peters at Ms. Bogart's direction or the U.S. Marshall at Ms. Bogart's direction or with her knowledge and consent, removed the jury books from the jury box and caused them to be placed in the jury room for consideration by the jury.

27. The defense did not discover that the jury books had been sent back to the jury on June 9, 1987 until Friday, June 12, 1987 at 4:30 p.m. It was at that time that Judge Bua had instructed the parties to return to the courtroom to determine what, if any, action should be taken if the jury had not yet rendered a verdict. By then the jury had been deliberating four full days with the use of the jury books. At that time Susan Feibus, my co-counsel, informed me that she had just had a discussion with US Marshall John Cullnan who had informed her that the jury books were in the jury room. I was astounded by that discovery and promptly moved for a mistrial and for an immediate factual hearing on how the jury books found their way into the jury room. Both motions were denied. Without waiving our position that the presence of the jury books in the jury room was grounds for an immediate mistrial, I then moved the Court to remove the jury books from the jury room which the Court did.

28. Also, at that time the court called the jury into the courtroom and asked the jury if there were close to reaching a verdict. The foreman responded with a resounding "No!"

29. On Monday June 15, 1987 the court advised the parties that immediately upon arrival at 9:30 a.m. to continue deliberations, the jury foreman went into the court's chambers and asked the Court's secretary where the jury books were. At 1:30 p.m. on June 15, 1987 after only three

hours of deliberation (assuming one hour for lunch) without the jury books and having stated to the Court on June 12, 1987 at 4:30 p.m. that it was not close to reaching a verdict, the jury in fact reached a verdict.

30. On June 17, 1987, in the morning I retrieved defendant Bewick's exhibits from the jury room. The exhibits were in their respective manilla folders just as we had placed them before they went back to the jury and the manilla folders were in perfect order just as they were when they were submitted to the jury. In brief, defendant Bewick's exhibits appeared to be untouched by the jury.

31. In an attempt to determine how the jury books ended up in the jury room, I interviewed U.S. Marshall John Cullnan, the U.S. Marshall assigned to Judge Bua's Courtroom during the trial to watch over the jury. He was the person with the responsibility of physically bringing the government and defense exhibits back to the jury room on June 9, 1987. I interviewed him on June 22, 1987 at 3:30 p.m. in the presence of his supervisor on the 24th floor in the reception area outside the U.S. Marshall's office.

32. U.S. Marshall Cullnan informed me that after the defense left the courtroom on June 9, 1987, Susan Bogart returned from rexeroxing certain exhibits. The Bewick exhibit that she recopied was placed in the box of Bewick exhibits. That box plus the other defense exhibits were brought by him into the jury room. Marshall Cullnan then informed me that he then began bringing the government exhibits back to the jury room. He used two carts to do so.

33. According to the U.S. Marshall the carts were loaded by Agent Peters. The procedure was that Agent Peters loaded one cart, U.S. Marshall Cullnan took that cart back to the jury room and unloaded it and while U.S. Mar-

shall Cullnan was doing that Agent Peters loaded the other cart.

34. Agent Peters first loaded the boxes of government exhibits which were lined up on the spectator bench. After those were unloaded by U.S. Marshall Cullnan in the jury room, U.S. Marshall Cullnan returned to the courtroom. Marshall Cullnan informed me at that time, Agent Peters was loading the jury books into a cart. Agent Peters was taking the jury books from the jury box and placing them in the cart which was right next to the jury box. Susan Bogart was present at the prosecutors table which was next to the jury box. Susan Bogart could see this process clearly.

35. U.S. Marshall Cullnan informed me that he walked up to Agent Peters who was loading the jury books into the cart. Agent Peters had already loaded about six books into the cart. U.S. Marshall Cullnan asked, "Are these going too?", and Agent Peters said, "Yes." Agent Peters then loaded the remainder of the jury books into the cart and U.S. Marshall Cullnan took the cart containing the jury books back to the jury room and unloaded them in the jury room. According to U.S. Marshall Cullnan at no time did Susan Bogart stop this process which was performed in her presence.

36. According to U.S. Marshall Cullnan the loading of the jury books into the cart took place while Judge Bua was on the bench conducting his morning call.

37. After I interviewed U.S. Marshall Cullnan, with George Lynch, Counsel for Defendant Best, I attempted to interview FBI Agent Peters by telephone. Mr. Lynch and I called Agent Peters at 4:20 p.m. on June 22, 1987, from my office. We called Agent Peters at the FBI offices in Chicago at 431-1333. I placed the call and Mr. Lynch was on an extension phone. I informed Agent

Peters that Mr. Lynch was on the other line and Mr. Lynch greeted Agent Peters. I then said that we were trying to determine how the jury books got back to the jury room. I stated that I understood that Agent Peters loaded them onto the cart so that they could be brought into the jury room. I said, "Could you tell me how that happened?" Agent Peters responded, "I sure can. Can I get right back to you? I'll call you right back." I said, "Fine."

38. Mr. Lynch and I then waited in my office for Agent Peters to return our call. Ms. Susan Feibus joined us. By 5:00 p.m. we had not received a return call from Agent Peters, so I called him. Another Agent in his section informed me that Agent Peters was "on a long distance call." I left a message for Agent Peters to call me.

39. At 5:05 p.m. Agent Peters called. He stated that he had been talking on the phone long distance with Susan Bogart and that she had advised him not to talk to us and that he was going to follow her advice. I said that we were just trying to find out how the jury books got back into the jury room and again he refused to discuss it with me pursuant to Susan Bogart's advice and stated that they would prefer to wait until they saw what our affidavit said before they responded. I again stated that we were just trying to find out what happened and Agent Peters again refused to answer any questions. I asked, "You are following Susan Bogart's instructions not to talk with us?" and Agent Peters replied, "Yes."

/s/ James S. Montana, Jr.

SUBSCRIBED AND SWORN TO
before me this 30th day of June, 1987

/s/ Randi N. Thompson
NOTARY PUBLIC

* * * * *

think we're going to have any problems that we need to resort to the court to, but I can't speak for everybody.

. . .

MR. LYNCH: Judge, we have got a problem in relation to one document which was found in the loan file on the West Chicago transaction. We object to it going to the jury. It is a letter dated well after the alleged conspiracy was complete, April 20. 1984. It is a letter drafted by Mr. Langel, I believe, to Mr. Bewick. My client was no longer with the Savings and Loan at the time, and it is a letter that is obviously in contemplation of litigation. We would object to that letter.

THE COURT: That letter was included in the West Chicago loan file?

MS. BOGART: Right. It was premarked prior to the trial, LH-2D.

MR. MONTANA: That's true, your Honor. We object to that as well.

THE COURT: May I see the letter?

MR. MONTANA: Yes. Your Honor will recall that our discussion at the time the loan files were admitted was that we wanted time to review those to see what would go to the jury, and reserved our right to make the objection to it going to the jury at the appropriate time. So we haven't waived that. So this is the appropriate time.

This is, obviously, a letter self-serving written in anticipation of litigation and setting forth their position because

of the litigation that was either pending or about to be pending.

THE COURT: And not specifically admitted in evidence?

MR. MONTANA: No.

THE COURT: I quite agree. I don't think this should go back to the jury.

MS. BOGART: There are three documents here that have to be recopied because they have markings. If there is no further business, I was going to run down and just make clean copies of defense exhibits that were marked and then I'll be right back up.

THE COURT: By all means. We don't want to bring in the exhibits piecemeal, obviously.

MS. BOGART: Right.

THE COURT: All right, if you don't hear from the court, I will see you at 4:30.

MR. SHALGOS: Shall I mark on these exhibits, Judge, "Conarty exhibits"?

MS. BOGART: I have not seen those.

MR. SHALGOS: Can they go back like that, or individually or does it make any difference?

THE COURT: If the government doesn't object to the way they go back—

MS. BOGART: No.

THE COURT: Are the government's exhibits segregated now?

MS. BOGART: Yes, Judge.

MR. MONTANA: Yes, your Honor. And they are—

THE COURT: Where? May I see them?

MR. MONTANA: And the defense exhibits, my exhibits, there are two charts plus documents, are in a separate box. So I don't know if the marshal takes possession of those—

THE COURT: Yes, just put them on this desk here and the marshall will make them available to the jury. Not yet, though, until Ms. Bogart brings up those documents.

MR. MONTANA: Okay.

THE COURT: But you can put them there. I just want to see them.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	No. 86 CR 442
	)	Judge
GREGORY J. BEWICK, et al.,	)	Nicholas J. Bua
	)	
Defendants.	)	

AFFIDAVIT

SUSAN G. FEIBUS, being duly sworn on oath, deposes and states as follows:

1. I am one of the attorneys for defendant Gregory J. Bewick. I have personal knowledge of all of the facts set forth in this affidavit. If called to testify at any hearing on this matter, I am willing to and would testify in a manner consistent with this affidavit.

2. I submit this affidavit in support of defendant Bewick's motion to vacate the jury's verdict and to dismiss the indictment or, alternatively, to grant a new trial based upon prosecutorial misconduct in submitting the "jury books" to the jury during its deliberations without the consent, acquiescence or knowledge of defendant Bewick or his attorneys and contrary to the representations of Assistant United States Attorney Bogart who stated that the jury books would *not* go back to the jury.

3. On June 8, 1987, closing arguments were made and the jury was instructed. At the end of that day the Court

ordered the parties to return the next day, June 9, 1987, at 8:45 a.m. to review the exhibits which each party proposed to submit to the jury for its review during deliberations.

4. During the evening of June 8, 1987 and the next morning, June 9, 1987, my co-counsel, James S. Montana, Jr., and I repeatedly discussed the need to discover whether the government would seek to have the jury books go back to the jury. Mr. Montana stated that it would be highly improper for the government to seek to do so and we would object strenuously to any such attempt.

5. On June 9, 1987 at 8:00 a.m., Mr. Montana and I arrived at the courtroom. Also present were George Lynch, attorney for defendant Best, and Leland Shalgos, attorney for defendant Conarty. At that time the jury books were located in the jury box as they had been throughout the trial; there was one jury book in the vicinity of each juror's chair. Because the jury books were on the floor of the jury box next to the jurors' chairs, they could not be seen unless one leaned over the partition in front of the jury box to see what was on the floor.

6. Shortly after 8:00 a.m. Special Agent Peters arrived with the government's exhibits. There were approximately ten boxes filled with government exhibits. Agent Peters unloaded the boxes in a row onto the first spectator bench on the right side of the courtroom as one faces the front of the courtroom. Mr. Lynch, Mr. Shalgos, Mr. Montana and I began to review the government's exhibits.

7. At approximately 8:20 a.m., Susan Bogart arrived. From 8:20 until Judge Bua came out on the bench, Mr. Lynch, Mr. Shalgos, Mr. Montana and I continued to review the government exhibits contained in the boxes on

the first spectator bench. During that entire period of time, the jury books were not on the spectator bench but remained in the jury box next to the jurors' chairs.

8. Based upon the prior discussions between Mr. Montana and myself regarding the impropriety of the jury books going back to the jury, I asked Ms. Bogart if she intended to seek to submit the jury books to the jury for consideration during deliberations. Ms. Bogart replied that she did not. At the time that I asked Ms. Bogart this question we both were standing at the back corner of the table used by the government during the trial. This was the table closest to the jury box. At the time that I questioned Ms. Bogart, Mr. Lynch was sitting only a few feet away in the far end of the jury box reviewing government exhibits.

9. Following Ms. Bogart's answer that she did not intend to seek to submit the jury books to the jury, I immediately walked over to Mr. Montana who was seated at the defense counsel's table which was several feet behind the government's table. I said to Mr. Montana, "I just asked her (Susan Bogart) if she intended that the jury books go back to the jury and she said 'no.' " Mr. Montana replied, "Good, then we won't have to worry about it." No one else was present who could overhear this discussion.

10. During this same period of time, Ms. Bogart reviewed the defense exhibits. I was present, along with Mr. Montana, when Ms. Bogart began her review of defendant Bewick's exhibits which had been placed in separate manilla folders within a box. I was present when Ms. Bogart discovered that one of defendant Bewick's exhibits had orange highlighting ink on it. Mr. Montana subsequently informed me that Ms. Bogart had agreed to take

that exhibit to the fifteenth floor to be rexeroxed and then reinserted in the box of Bewick exhibits to be submitted to the jury.

11. At approximately 9:18 a.m. Judge Bua came out on the bench. By that time, the defense had reviewed all of the government exhibits and Ms. Bogart had reviewed all of the defense exhibits. There was a discussion with the Court regarding the parties' review of the exhibits to be submitted to the jury. Mr. Lynch had an objection to one or two of the exhibits which the government wanted to go back to the jury and the Court sustained Mr. Lynch's objection.

12. During this discussion with the Court, Judge Bua asked if all of the exhibits which were to go back to the jury had been segregated. The answer by all of the parties was that this had been accomplished. The defendants' exhibits were placed on the table next to the bench on the Court's right. The boxes of government exhibits were segregated on the first row of the spectators' benches to the Court's left. At that time, the jury books remained under the jurors' seat in the jury box.

13. After the Court left the bench, Ms. Bogart left the courtroom to rexerox the Bewick exhibit which had orange highlighting ink on it. Mr. Lynch, Mr. Shalgos, Mr. Montana and I then left the courtroom because the review of the exhibits had been complete. When we left, the jury books still were under the jurors' seats in the jury box.

14. On Friday, June 12, 1987, the parties were instructed by Judge Bua to appear in his courtroom at 4:30 p.m. The jury was still deliberating and had been deliberating since the morning of June 9, 1987. Mr. Montana

and I arrived on the 21st floor where Judge Bua's courtroom is located. Outside of the courtroom we met Messrs. Lynch and Shalgos.

15. I walked into the courtroom first, by myself. The only person in the courtroom was the marshall who had been supervising the jury nearly every day of the seven week trial and with whom I had come to exchange pleasantries. Upon seeing the marshall, I greeted him with the expression, "How's it going?" He replied that "the jury room is a mess" and that "charts are all over the place and the books are all over the place."

16. When the marshall said to me "the books are all over the place," I asked him what he meant and whether the jury books had gone back to the jury. He replied that they had. I was so shocked to hear this that I immediately ceased my conversation with the marshall so I could inform the other defense counsel of these events. I turned around and saw that Mr. Montana had entered the courtroom. I immediately walked up to him and stated, "the marshall has just indicated to me that the jury books went back to the jury." He, too, was shocked to learn that this might have occurred and stated that we will have to find out if this was true. Mr. Montana and I then relayed this information to Messrs. Lynch and Shalgos.

17. When the Court came on the bench, Mr. Montana stated that the defense had just learned that the jury books may have gone back to the jury and that the defense never had agreed to that.

18. At no time did Mr. Montana or I agree or consent to the jury books going back to the jury room. In fact, had the government proposed that, we intended to and would have objected strenuously because those books con-

tained only a selection of government exhibits prepared by the government to demonstrate the defendants' guilt.

Further affiant sayeth not.

/s/ Susan G. Feibus

SUBSCRIBED AND SWORN To
Before Me This 1st Day
of July, 1987.

/s/ Mary A. Dietmeyer
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	NO. 86 CR 442
	)	
JOHN C. BEST, et al.,	)	HONORABLE
	)	JUDGE BUA
Defendants.	)	

AFFIDAVIT

Now comes the affiant, GEORGE P. LYNCH, under oath, and states as follows:

1. The affiant is the attorney for John C. Best.

2. During the above-stated trial the court ordered the defense and the prosecution to review the exhibits in evidence that would be submitted to the jury for their consideration during their deliberations. On June 9, 1987 the affiant along with Mr. Leland Shalgos, Susan Feibus, and James Montana, the attorneys for the other defendants, appeared in Judge Bua's court at 8:00 a.m. to review the government's exhibits prior to submission to the jury and to present for review their exhibits to the government before being sent back to the juryroom. The defense attorneys arrived at the courtroom precisely at 8:00 a.m. and no one from the prosecution was present. A short period of time later, F.B.I. Agent Michael Peters arrived at the courtroom with a series of approximately 10-12 transfer cases filled with Government exhibits. Mr. Peters placed the exhibits in their transfer cases on the first bench in the courtroom on the south side of the court-

room. The defense attorneys placed their exhibits on the first bench of the courtroom on the north side of the courtroom. The defense attorneys began checking the government's exhibits. Assistant U.S. Attorney Susan Bogart arrived at the courtroom at approximately 8:20 a.m. while the defense attorneys were checking government exhibits. After Ms. Bogart arrived at the courtroom the affiant sat in the last seat in the first row of the jurybox at the west end of said box. The affiant was checking a loan file at the time and removing documents which were prejudicial, not in evidence, and totally irrelevant to the case. While the affiant was seated in that jury chair, he noticed the "jurybooks" were located on the floor around each of the chairs. Susan Feibus was near the affiant during this period of time. The affiant asked Susan Feibus "if she knew that the government was going to seek to transmit the jurybooks to the jury room". The reason the affiant had made this statement was that if the government sought to present the books to the jury, he would have first objected strenuously as the books in and of themselves were extremely prejudicial as they were a "roadmap" of the government's case and slanted in such a way as to exclude the defendants' presentation. Ms. Feibus turned to Assistant U.S. Attorney Bogart who was only a few feet away and asked her what the government's position on the "jurybooks" was, and were they seeking to have them sent to the jury. Assistant United States Attorney Bogart said in a voice loud enough for the affiant to hear that the government was not seeking to send the "jurybooks" to the jury room for consideration of the jurors. All of the parties continued to examine documents and from time-to-time Agent Peters or Assistant U.S. Attorney Bogart would leave the courtroom to photocopy documents which had improper markings on them. At about 9:18 a.m. Judge Bua came on the bench and inquired as to the progress being made by the attor-

neys. The affiant made an objection to a government exhibit "LH-2d" from going to the jury. The court sustained the defense objection. The court then asked Mrs. Bogart if the government's exhibits were segregated at that time. Ms. Bogart answered the judge affirmatively. The court requested all parties to place their exhibits on the desk which is located at the front of the courtroom on the north side of the bench. The defendants carried their exhibits up to that point.

3. At the time that the court questioned Assistant U.S. Attorney Bogart whether her exhibits were segregated and after she replied "yes", all of the government's exhibits were in fact segregated and located on the first bench on the South side of the courtroom in their appropriate cases. The "jurybooks", which the government had already said would not be sent back to the juryroom, were still on the floor of the courtroom around the jury chairs in the jurybox. No one had directly or indirectly indicated that the "jurybooks" would be transmitted to the jury. The only statement in this regard was made by Assistant U.S. Attorney Bogart when in answer to Ms. Feibus's inquiry, said the government would not seek to send the "jurybooks" to the juryroom during deliberations. After the defense attorneys placed all of their exhibits in the appropriate location, Judge Bua was prepared to begin his regular call for June 9, 1987. There being nothing else to do, the defense attorneys left the courtroom (the time was approximately 9:30 a.m.).

4. On June 12, 1987 the defendants became aware that the "jurybooks" had been brought back to the juryroom at the government's direction on June 9, 1987 out of the defense attorneys presence and in contravention of the statements of the U.S. Attorney that said books would not be sent to the jury. The defense attorneys immediately objected and made a motion for a mistrial before Judge

Bua. Judge Bua immediately ordered that the books be removed from the juryroom with the notes that were in the books and that said books and notes be sealed by the court for consideration at a later date if necessary. The government has never denied that they ordered the books be sent back in contravention to Ms. Bogart's statement to Ms. Feibus which was overheard by affiant.

5. An in-camera interrogation of the jurors was made by Judge Bua after all verdicts were returned. Each of the jurors admitted that they had utilized the "jurybooks" during their deliberations. Several of the jurors indicated that they used the "jurybooks" as a guide in their deliberations. The use of these books as a guide in the deliberation of the jury greatly prejudiced the defendants because the documents are totally government documents and are slanted towards the prosecution's theory of the case. The books consciously omit all documents which are favorable to the defendants. These documents include the contracts on the various properties, the loan commitments on the various transactions, the notes executed by Mr. Henning on the loans he received from the defendant Best which the government refers to as kickbacks, the contract for the purchase of the Wayne properties and the appraisals on said properties which indicate that Mr. Henning had entered into a bona fide purchase of the lots from Mr. Best, the correspondence between Mr. Henning and Dr. Pearah, the handwritten notes of Dr. Pearah which contradict his testimony, the contract for purchase of the Rosewood condominiums by Patrick Ryan from Christian Henning showing Mr. Hennings profit in excess of $400,000, the vouchers for the checks which were included in the trial book that explained what the checks were paid for which exculpates the defendant in many instances, the action of the Board of Directors of the Service Company approving Mr. Henning's finders fee. The

notes of Mr. Henning which were paid by the $26,000 check that Mr. Henning received from the Service Corporation which is in total contradiction to the materials found in the trial book and the assertions of the U.S. Attorney that the $26,000 went to pay Steve Poijman. The book was slanted in such a way as to leave out the explanatory documents of each of the loan transactions and attempt to focus all of the attention on check disbursements without placing the documents which explain what the check disbursements were for. The "jurybook" was truly a "roadmap" to conviction for the defendants as it stimulated the jurors to accept the prosecution's theory of presentation to the exclusion of the defendants' theory. The books were further prejudicial as the jurors indicated that they would ask for other documents as they went through the "jurybooks". The only documents that the "jurybook" would stimulate a search for were government documents.

6. The "jurybook" was further damaging to the defendant Best because two documents were contained in the book which were never received in evidence. Those documents were Government-Best 1A and Government-Best 1B. These are ledger documents which show a heavy cash-flow activity through two accounts that belong to Mr. John Best and his wife. The submission of these two documents in the "jurybook" only exacerbated the concern and wonderment of the jury as to where all the money was coming from that went through these accounts.

7. The conduct of the U.S. Attorney in causing the "jurybooks" to be sent to the jury room in secret after the defense attorneys had left the courtroom and after affirmatively indicating that she was not seeking to send the "jurybooks" to the jury, was greatly prejudicial to the defendants.

8. On June 22, 1987 at 4:00 p.m. the affiant and Mr. James Montana placed a conference telephone call to the Chicago offices of the F.B.I. Mr. Montana requested the operator to connect him with Special Agent Michael Peters of that office. Mr. Peters was the gentleman who was present during the checking of the government's exhibits prior to their transmission to the jury. The operator connected Mr. Montana and the affiant to Special Agent Michael Peters. Mr. Montana identified himself to Agent Peters and also informed Agent Peters that the affiant was on another line and affiant also identified himself to Agent Peters and said "hello". Mr. Montana then told Agent Peters that the purpose of the telephone call was to inquire as to how the "jurybooks" wound up in the juryroom. Agent Peters indicated he had no objection to speaking to us about the transmission of the "jurybooks" into the juryroom, but he wished to call us back before discussing the matter with us. The affiant and Mr. Montana hung up the telephone and awaited Agent Peters' return call. Approximately fifteen minutes later, Mr. Montana called the F.B.I. offices again and this time the affiant was seated across the desk from Mr. Montana listening to his end of the conversation. Mr. Montana acknowledged the operator, requested to speak to Agent Peters, and was told that he was on a long distance telephone call. Mr. Montana hung up the telephone again. Approximately ten or fifteen minutes later Agent Peters called Mr. Montana's office and the affiant was seated across the desk from Mr. Montana when he answered the telephone. A conversation ensued in which the affiant could hear Mr. Montana speaking to Agent Peters. Mr. Montana, after listening to Agent Peters, asked him over the telephone what reason he, Agent Peters, had for not speaking to Mr. Montana and the affiant about the transmission of the "jurybooks" to the juryroom. Mr. Montana asked Agent Peters if he had called Susan Bogart, Assis-

tant U.S. Attorney, during the intervening period between the first telephone calls. Agent Peters acknowledged to Mr. Montana that he had in fact called Susan Bogart long distance as she was on a vacation. Mr. Montana again asked Agent Peters if he would speak to us regarding the movement of the "jurybooks" into the juryroom. Agent Peters informed Mr. Montana that he would not speak to us about the matter and that he had been told not to speak to us about the matter by Susan Bogart, the Assistant U.S. Attorney.

9. The conduct of Assistant U.S. Attorney Bogart of informing a witness with key information not to speak to the attorneys for the defendants is improper. Said conduct in curtailing the investigation of this matter by the government is a fundamental denial of the defendants' rights to due process of law under the Fifth Amendment to the United States Constitution and further is a violation of the defendants' rights to effective assistance of counsel under the Sixth Amendment to the United States Constitution.

Further affiant sayeth not.

/s/ George P. Lynch

Subscribed and Sworn to
before me this 26th day
of June, 1987.

/s/ Donna Bergstrom
NOTARY PUBLIC

GEORGE P. LYNCH
29 S. LaSalle Street
Suite 440
Chicago, Illinois 60603
(312) 782-8520

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	NO. 86 CR 442
	)	
PAUL CONARTY,	)	HONORABLE
	)	JUDGE BUA
Defendant.	)	

AFFIDAVIT

LELAND SHALGOS, being first duly sworn, states as follows:

1. He is the attorney for defendant Paul Conarty.

2. All of the events testified to in this affidavit are within his personal knowledge.

3. During the trial of the aforementioned matter, "jurybooks" were prepared by the prosecution. These books contained documents selectively culled by the prosecutors from loan files for purposes of outlining and demonstrating their theory of defendants' guilt. The "jurybooks" contained no exculpatory documents and in some cases even contained only selective portions of a whole document. Additionally, the "jurybooks" contained some documents never admitted or offered into evidence.

4. On June 9, 1987 at 8:00 a.m., Mr. George Lynch, attorney for John Best, Mr. James Montana, and Ms. Susan Feibus, attorneys for Gregory Bewick, and affiant met in Judge Bua's courtroom for purposes of reviewing

any and every document that was to be sent to the jury during their deliberation.

5. Shortly after defense counsel arrived, the prosecution began arriving with numerous cardboard boxes filled with documents. All of the boxes were placed on the first spectator bench on the south side of the courtroom. None of the boxes contained any "jurybooks". Upon their arrival, the defense attorneys began a laborious inspection of each box of documents.

6. Prior to affiant's actual inspection of boxes, I walked over to the bench where all of the boxes had been placed by the prosecutor or Special Agent Michael Peters. Upon a cursory inspection of many of the boxes' contents, affiant removed an entire box of Kings Point documents to the defense table on the north side of the courtroom, and proceeded to inspect them individually. At some point shortly thereafter, Assistant United States Attorney Susan Bogart and affiant had a conversation wherein we agreed to withdraw certain of the marked and/or irrelevant documents contained in the box.

7. Upon completion, affiant replaced this box on the bench in exactly the same position from which it was taken. At that time, there was nothing on this bench other than these numerous boxes. None of the boxes contained "jurybooks".

8. At no time during that morning did anyone from the prosecution present for inspection, suggest, state, or insinuate, directly or indirectly, that the "jurybooks" would be sent back to the jury during their deliberations. The subject was never broached and when Ms. Bogart indicated to Judge Bua that all the exhibits had been segregated, affiant had not even seen the "jurybooks" in the

vicinity of the boxes of documents that had been examined that morning.

9. Shortly after that discussion between Judge Bua and Assistant United States Attorney Bogart, affiant handed his exhibits to the Marshal and left the courtroom because the work had been completed.

10. The first time affiant learned that the "jurybooks" had been included in the materials sent back to the jury was on June 12, 1987 in the late afternoon, four days into the jury's deliberations.

Further affiant sayeth not.

/s/ Leland Shalgos

Subscribed and Sworn to
before me this 26th day
of June. 1987.

/s/ Donna Bergstrom
NOTARY PUBLIC

STATE OF ILLINOIS
COUNTY OF COOK—ss

AFFIDAVIT

I, CHARLES MICHAEL PETERS on oath do state as follows:

1. I am a Special Agent with the Federal Bureau of Investigation and have been so employed for approximately 11 years.

2. I was the case agent assigned to the *United States v. Best* case, 86 CR 442.

3. I assisted the government and sat at counsel table throughout the seven week trial in this case before the Honorable Nicholas J. Bua from April 20, 1987 through and including June 8, 1987.

4. On June 9, 1987, shortly after 8:00 a.m., I arrived in Judge Bua's courtroom pushing an evidence cart containing 9 boxes of the government's documents in evidence in the case of *U.S. v. Best, et al.* which I unloaded on the first bench in the gallery of the courtroom next to the jury box. I also unloaded the loan register in evidence, the CFR, the Illinois Revised Statute, and Helen Mirza's statute book onto government counsel table.

5. Already in the courtroom were all of the numerous government charts admitted into evidence; the loan proceeds/exchange check charts, the net worth baseboard chart, and the photographs, all of which were leaning against the front end of the jury box as you faced the jury box. The clear overlays to the Net Worth chart were rolled up and laying alongside the end of the jury box nearest the gallery section.

6. On the floor of the jury box either on top of or in front of each juror's chair were the black notebooks passed out to the jury during the first week of trial; during the testimony of Sam Lentine and which remained with the jury on the jury box through the remainder of the seven week trial.

7. At no time on June 9, 1987, did I tell any member of the defense team that the nine (9) boxes I unloaded on the benches was all of the government's evidence and all that the government would seek to send back to the jury.

8. Moreover, at no time did I, on June 9, present, point out, or otherwise direct the members of the defense team to any particular evidence of the government. Rather, I made all the government's evidence available to the defense for their inspection.

9. At no time on June 9, 1987, did I observe any member of the defense inspect, examine or touch the government's charts in evidence, the overlays to the Net Worth Chart, the jury books, or the loan register, the CFR, the Illinois Revised Statute, or Helen Mirza's copy of the federal regulations.

10. The only evidence that I saw the members of the defense inspect was the documents contained in the nine (9) boxes.

11. At no time on June 9, 1987, did I observe or hear any member of the defense point out, present or otherwise direct the government to its documents in evidence or Bewick's charts. Rather, the defense made this evidence available by placing it on the first bench in the gallery next to defense counsel table, on defense counsel table, and by leaning Bewick's charts against the first row of benches.

12. On June 9, while examining Best's folder of documents in evidence I overheard AUSA Bogart question Bewick's chart on the organization of the savings and loan. In response, I heard Mr. Montana say to AUSA Bogart "Well aren't the government charts going back?" and, when AUSA Bogart said "Yes", he said "Well then the defense charts are going back."

13. After the colloquy on the record concerning what evidence would not go back to the jury, I remained in the courtroom with the government's evidence while AUSA BOGART left to copy some defense documents. Shortly, after placing their respective exhibits on the desk next to the bench, all defense counsel left the courtroom.

14. Shortly thereafter Judge Bua resumed the bench and his morning court call began. The gallery of the courtroom and the chairs at the tables were filled with people.

15. After AUSA Bogart arrived back in the courtroom, she and I began loading the government's evidence onto a cart. While doing this, AUSA Bogart inspected the charts and overlays. She removed two charts not in evidence from the group leaning against the jury box and she removed two transparent overlays not in evidence from the group of overlays in evidence.

16. Therafter, AUSA Bogart and I collected all the jury books from the jury box and stacked them on the bench with the other government documents in evidence.

17. I then waited with AUSA Bogart until the courtroom deputy took all the government's evidence to the jury room and then returned to the U.S. Attorney's office with the evidence cart and AUSA Bogart.

18. I never told Mr. Montana at any time that the boxes on the bench were the only evidence of the government going back to the jury.

19. Finally, AUSA Bogart did not instruct me not to talk to the defense attorneys as represented in Mr. Montana's affidavit. Rather, she advised me of the probable purpose of their call and offered her advise that I might want to wait until their motions were filed before speaking to them. I chose to follow this advice.

20. At no time after arriving in Judge Bua's courtroom just after 8:00 a.m. until the evidence was with the jury did I have a conversation with any member of the defense about the jury books.

21. Moreover, at no time on June 9, 1987 did I hear any member of the defense team discussing the jury books with AUSA Susan Bogart nor did I hear AUSA Susan Bogart made any statement to any member of the defense team concerning the jury books.

/s/ Charles Michael Peters

STATE OF ILLINOIS
COUNTY OF COOK—ss

AFFIDAVIT

I, SUSAN BOGART on oath do state as follows:

1. I am an Assistant United States Attorney for the Northern District of Illinois and have been so employed since October of 1981.

2. I was the principal prosecutor assigned to the case and trial of *United States v. Best*, 86 CR 442.

3. On June 9, 1987, sometime after 8:00 a.m., I arrived in Judge Bua's courtroom, at which time defense counsel, George Lynch, James Montana and Leland Shalgos were beginning their review of the government's evidence to be submitted to the jury.

4. In the courtroom and segregated in and around the government's table, the first row of the benches in the gallery of the courtroom, against the front of the jury box, and alongside the jury box was all the government's exhibits in evidence, leaning against the front end of the jury box to the right as you faced it were the government charts, including the loan proceeds/exchange check charts, the net worth baseboard chart, and the photographs, all of which had been in the same location throughout the seven weeks of trial. The clear overlays which went on the Net Worth base chart were laying alongside the end of the jury box nearest the gallery section where they had been during the seven weeks of trial. The government documents in evidence were contained in nine (9) boxes which had been placed on the first bench in the gallery section nearest the jury box. The documentary evidence had been removed every evening on

the government's evidence carts during the seven weeks of trial.

5. On the floor of the jury box either on top of or in front of each juror's chair were black notebooks passed out to the defense, the Court and the jury during the first week of trial and which had remained in the jury box throughout the seven weeks of trial.

6. The first objection raised by the defense in my presence to the jury book being with the jury during its deliberations was at the June 12, 1987 appearance transcribed and set forth as Attachment B to the Government's response to defendants' motion for a new trial or dismissal of the indictment.

7. At no time on June 9, 1987 or at any time thereafter until June 12, 1987, did any member of the defense team discuss the jury notebooks with me, nor did I state to any member of the defense team that:

a) It was not my intention to send the jury notebooks back to the jury room, (See Feibus, at p. 9, Attachment B, Tr. 6/12/87);

b) I was not going to ask to have the books go back to the jury. (See Montana, at p. 86, Attachment B, Tr. 6/15/87;

c) "No" in a clear and loud voice to the question from Ms. Feibus "Are you going to seek to have those books sent back to the jury?" (See, Lynch, p. 101, Attachment B, Tr. 6/15/87);

d) That the boxes on the first bench of the gallery of the courtroom were the only exhibits the government intended to have go back to the jury room. (See Def. Memo of Law, p. 2).

8. Indeed, AUSA Bogart in response to a question from attorney Montana concerning the government's charts specifically stated that she intended to send the government's charts back to the jury and these charts were not on the first bench in the gallery of the courtroom.

9. On June 9, after defense counsel left the courtroom, I went through all the evidence to insure that it was in evidence. In going through the charts and overlays I found 2 charts and 2 overlays not in evidence and removed those from the charts and overlays in evidence.

10. On June 17, 1987, I was present when Mr. Montana and his law clerk arrived to obtain defendant Bewick's exhibits. At that time, Mr. Montana withdrew the government's folder marked Bewick Cross from the Box of Bewick's documents and handed it to me stating "This is a government exhibit." Upon examining the contents of this folder, I found defendant Bewick's folder for Exhibit Exam 5C and Bewick Exhibit Exam 5C inside it, along with the government's documents. Thereafter, at Mr. Montana's request, the folder for Bewick Exam 5C and the Bewick Exhibit Exam 5C were returned to Mr. Montana. (See Attachment 1, the letter transmitting this document and folder back to Mr. Montana).

10. Moreover, on June 18, upon examining the government's boxes containing its documents in evidence, the folders containing defendants Best's and Conarty's Exhibits were filed with the government's exhibits bearing the defendants' names. (See Attachments J and K).

/s/ Susan Bogart
Assistant United States Attorney

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN C. BEST, GREGORY J. BEWICK,
and PAUL F. CONARTY,

Defendants.

No. 86 CR 442 — Chicago, Illinois

TRANSCRIPT OF JURY TRIAL PROCEEDINGS
BEFORE THE
HONORABLE NICHOLAS J. BUA AND A JURY

PRESENT:

For Government:*	SUSAN BOGART
For Defendant John C. Best:	GEORGE PATRICK LYNCH
For Defendant Gregory J. Bewick:	JAMES S. MONTANA, JR. SUSAN G. FEIBUS
For Defendant Paul F. Conarty:	LELAND SHALGOS
Case Agent:	MIKE PETERS
Court Reporter:	Agnes M. Thorne Official Court Reporter

* * * * *

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* William R. Hogan, Jr. appeared only on April 24, 1987, July 7, 1987, and August 27, 1987; Patrick E. Deady appeared only on June 15, 1987, and June 16, 1987.

[676]* **April 24, 1987**

MR. HOGAN: Your Honor, there is one other matter. I intend to ask that the jury be entitled to receive these binders which contain most of, we feel, the pertinent documents that have been gleaned from the loan files. The defense has had these since the beginning of the trial and it has, in fact, been utilized during the cross-examination of the Government witnesses.

They are segregated by loan transactions, and I intend to utilize this book with Mr. Lentine this morning in regard to the loan files.

THE COURT: Any objection?

MR. SHALGOS: Yes, I object. I haven't gone through that with my client, every page. I don't know—

MR. HOGAN: There is nothing in those that didn't come out of the loan files and/or trust files, and they have had all of those documents for many months. In fact, they have had copies for many months.

MR. SHALGOS: That is what I don't know about.

MS. BOGART: And the bank accounts.

[677] MR. HOGAN: And the bank accounts, as well, your Honor.

Mr. Lynch specifically used that in his cross-examination yesterday of Ron Walters.

THE COURT: Very effectively.

MR. HOGAN: I agree.

THE COURT: What use do you intend to make of this notebook?

MR. HOGAN: I want the jury to be able to follow along with the description of the documents. There are a number of them that Mr. Lentine is going to be describing.

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* Numbers in brackets refer to the official court reporter's original pagination of the transcript of jury trial proceedings.

THE COURT: Documents which are introduced in evidence—

MS. BOGART: —or about to be.

THE COURT: —or about to be.

MR. HOGAN: Yes, Judge.

MS. BOGART: In the case of bank records, we have two lined up to come today, and then there will be The First National Bank of Chicago or Mr. Henning to identify his own records, all of which have been offered as stipulations which haven't been distributed yet.

THE COURT: Are you suggesting that the jury have this before them with an appropriate instruction of the Court that they are not to look at any of these documents unless they are specifically referred to a document just to insure that they [678] will be looking at no documents either not in evidence or not adequately qualified to be received in evidence. Is that correct?

MS. BOGART: Yes.

MR. HOGAN: Yes, Judge.

MR. MONTANA: And those notebooks will be collected and the jury will not have them while they are at recess?

THE COURT: Quite correct. With an admonishment that they are not to look at any documents except those specifically referred to.

MR. HOGAN: Yes, your Honor. They are an aid to the jury. That is all they are.

[5971] **June 9, 1987**

MS. BOGART: There are three documents here that have to be recopied because they have markings. If there is no further business, I was going to run down and just make clean copies of defense exhibits that were marked, and then I'll be right back up.

THE COURT: By all means. We don't want to bring in the exhibits piecemeal, obviously.

MS. BOGART: Right.

THE COURT: All right, if you don't hear from the court, I will see you at 4:30.

MR. SHALGOS: Shall I mark on these exhibits, Judge, "Conarty Exhibits"?

MS. BOGART: I have not seen those.

MR. SHALGOS: Can they go back like that, or individually, or does it make any difference?

THE COURT: If the government doesn't object to the way they go back—

MS. BOGART: No.

THE COURT: Are the government's exhibits segregated now?

[5972] MS. BOGART: Yes, Judge.

MR. MONTANA: Yes, your Honor. And they are—

THE COURT: Where? May I see them?

MR. MONTANA: And the defense exhibits, my exhibits, there are two charts plus documents, are in a separate box. So I don't know if the marshal takes possession of those—

THE COURT: Yes, just put them on this desk here, and the marshal will make them available to the jury. Not yet, though, until Ms. Bogart brings up those documents.

MR. MONTANA: Okay.

THE COURT: But you can put them there. I just want to see them.

* * * * *

June 12, 1987

[5986] * * * * *

MR. MONTANA: Judge, I have another motion for a mistrial which is of concern to me, and that is this. I understand that the jury has in the jury room while they are deliberating the jury books that they were looking at during the trial. We never agreed that the jury books

go back to the jury room during their deliberations. They were not among the exhibits that were shown to us by the government as going back to the jury room.

The jury book is simply from the government's perspective a summary and compilation of documents that the government feels are helpful to their case, and it is a duplication of what is already in the exhibits which are back there.

So if the jury has those jury books back there with them, which I understand that they do, then I'm moving for a mistrial.

[5987] THE COURT: How do you come to the conclusion that they are back there?

MR. MONTANA: I don't see them in the jury box, and I think if we were to ask the marshal, you would find that the jury books are back there.

THE COURT: I'm certain the jury books are back there if . . .

MS. BOGART: They were piled up on the bench.

THE COURT: Do you remember that the court said, "Look, before the exhibits go in, I want you all to agree as to what's going in. If there's any objection, let me know"?

MR. MONTANA: The jury books were never put out and submitted to us as going back to the jury room. All that we had were right on this bench. Right on this bench were about twelve boxes of exhibits right here, right here (indicating). And the jury books were next to the chairs of the jurors. They were never presented to us as going back to the jury room. We never looked at them.

THE COURT: Mr. Montana, if those jury books did not go back—and I assume they are back there, on the basis of Ms. Bogart's statement—if those jury books did not go back to the jury, the first question would be "Where are the jury books?"

This jury has had those jury books in their laps for seven weeks.

[5988] MR. LYNCH: The problem is the jury books do not contain the documents that are favorable to the defendants' case. They contain an incomplete summary of the documents relating to each of the pertinent transactions that favor the government's case.

THE COURT: Then the defendants should have objected to those jury books going into evidence at the time they were sent back to the jury room.

MR. MONTANA: Oh, no, no, Judge. There are two separate issues. There are two separate issues. Whether or not the jury books came into evidence for the purposes of the jury looking at those jury books during the course of the trial. That is No. 1. And, No. 2, whether or not those jury books should go back to the jury room.

With respect to whether or not the jury books should go back to the jury room, those jury books were never presented to us by the government—and I'll testify to this under oath—they were never presented to us by the government as going back to the jury room. All we thought were going back to the jury room were the exhibits, all the exhibits, themselves, not the jury books.

Those jury books are nothing but a compilation of the documents and exhibits in evidence from the government's point of view. So that the jury has got those jury books in the jury room, and they are thumbing through those jury books [5989] presumably not looking at the other exhibits which are in evidence.

THE COURT: Well, I don't know how we can presume that. I have to presume that this jury, especially this jury, is looking at all the exhibits in the jury room as evidenced by the fact that we haven't heard any stirring from that jury room, even in light of the fact that they have been deliberating for four solid days.

MR. MONTANA: Judge, I will make an offer of proof, and I will submit an affidavit to the court, or I'll testify to the court, and I will testify right now under oath that those jury books were never presented to us at the end of this trial as going back to the jury room. If the court accepts my representation of that, that's fine. If not, I ask that I be sworn in and testify.

THE COURT: Well, Mr. Montana, I don't think it is necessary. I assume they're in the jury room. I have no actual knowledge. I assume the government watched those books being carried into the jury room. Is that correct?

MS. BOGART: Well, I wouldn't say I did that, Judge, but they were on the bench, and that was all piled onto the cart.

MR. LYNCH: Oh, no.

MR. MONTANA: No, no.

MR. LYNCH: They were not on the bench.

[5990] MR. MONTANA: That's not true.

MR. LYNCH: They were on the chairs or next to the chairs.

MR. MONTANA: That's not true. I'll testify under oath right now.

THE COURT: I am not prepared to take any more testimony in this case, obviously, until after the verdict. But I think the record will reflect that the court stated at that time, "Get your exhibits together. If there is any objection to any of the exhibits going back to the jury room, advise the court, and the court will rule on it". There was an objection . . . I seem to recall one or two objections. The court ruled on them. The court assumed that all the other exhibits that were being carted to the jury room were not objected to.

But at any rate, you've made your motion. Let's await the results of the jury's verdict. If, indeed, we ever get to that point, we'll take it up at that time.

MR. MONTANA: I want to make the record perfectly clear, and I am willing to testify under oath to that effect or submit an affidavit to the effect that those jury books were not put on that bench with the other exhibits that were represented as going back to the jury room.

THE COURT: Do you want to do it by affidavit? By all means. I'm not going to hear any evidence on it.

MR. MONTANA: The jury books were lying in the jury [5991] box next to the chairs of the jurors. They were not put on that bench with the other exhibits that were to go back to the jury room. It was never represented to us that they were going back. In a half a second flat, I would have objected if I knew that those jury books were going back there. There is no question about that.

We had no notice that anybody intended to let those jury books go back to the jury room.

THE COURT: That's a matter that we may have to take up later on. If you want to submit an affidavit, fine. The government submit an affidavit within seven days; both sides.

MR. LYNCH: We join in that motion just so the record is clear.

THE COURT: Okay.

MR. SHALGOS: And we do, too.

MR. MONTANA: Judge, what I'm saying it is improper for the jury to have those jury books.

THE COURT: In order to get the record straight on it, if you could identify that part of the record where the court indicated as to what should happen as to the exhibits, you shouldn't have any problem finding it.

THE COURT REPORTER: Yes, Judge.

THE COURT: That would be right after the court instructed the jury.

THE COURT REPORTER: Do you want me to do it right now?

[5992] THE COURT: Oh, no, you can take at least two weeks. We're not going to get to it until two weeks or so.

MR. MONTANA: Judge, I just want the court to know that unless we were notified that those jury books were going back to the jury room, there is no way for us to voice an objection about whether or not they should go back there because our understanding was that they were not going back there. Nobody told us that they were going back there.

THE COURT: Who gave you that understanding?

MS. FEIBUS: Your Honor, my specific recollection is we had talked about this prior to the exhibits going back—

THE COURT: Who is "we"?

MS. FEIBUS: Mr. Montana and I. —had talked about the exhibits going back and about making sure among ourselves that these jury books were not going back to the jury room for precisely the reasons that have been articulated here.

That morning, Tuesday morning, when we came in, the jury books were just thrown all over underneath the jurors' chairs as they had been during the course of this trial.

Given our concerns in mind, I asked Ms. Bogart if those jury books were going back to the jury, if that was her intention, and she said, "No, it wasn't".

THE COURT: Ms. Bogart.

MS. BOGART: Judge, that's not my recollection at all.

[5993] MR. LYNCH: Oh, give me a break!

MR. MONTANA: Judge, you know what is the most significant thing about that? That the exhibits that were to go back to the jury room were put on that bench in boxes and we were told to look at them. Susan Bogart said, "Please look at them". I looked at them. I got here at 8:00 o'clock in the morning and looked at them. The jury books were next to the jurors' chairs in the jury box.

They were never put over there where the exhibits were that were going back to the jury room. They were never put back there.

MR. LYNCH: We would have had to have gone through those, too. We certainly couldn't allow jury books to go back.

MR. MONTANA: We would have objected to it, Judge. I never imagined in my wildest dreams that they would send back to the jury room a book that contains selectively the exhibits that they think are the ones that are the most incriminating.

THE COURT: Well, you are quite correct. There is no problem with that because the court went to pains to instruct the jury that they were not to look at any exhibit unless they were directed by the court to do so. And, obviously, there are a number of exhibits in here which were not admitted in evidence. Is that correct, Ms. Bogart?

MS. BOGART: In the jury book?

THE COURT: Yes.

[5994] MS. BOGART: No.

THE COURT: Are you saying that every exhibit in this book has been admitted in evidence?

MS. BOGART: Well, that is my understanding, Judge.

THE COURT: If that is so, then it is a moot question.

MS. BOGART: And, you know, I would point out as well, Judge—

MR. MONTANA: No, it isn't a moot question, your Honor, if the court please, because they have back in the jury room with them all of the exhibits in boxes. Now, what they are being permitted to do is to have a notebook separately with just those exhibits which are favorable to the government in a separate binder.

MR. LYNCH: Twelve notebooks.

MR. MONTANA: Twelve notebooks.

MR. LYNCH: Twelve notebooks.

THE COURT: You are saying it is reversible error if you took all of your exhibits and put them in one binder and brought them into the jury room?

MR. MONTANA: They didn't put them in one binder.

MR. LYNCH: They put them in twelve binders.

MR. MONTANA: No, no, they didn't put all of the exhibits in one binder. They put only certain exhibits in one binder, and I say it is reversible error.

MR. LYNCH: We were asked to put our exhibits on the [5995] desk that's on the left side as we face the rostrum. I put my exhibits there. Mr. Montana put his exhibits there. And the government's exhibits were still back on the bench.

THE COURT: That's right.

MR. MONTANA: On the bench.

THE COURT: The only exhibits here were the defense exhibits. I assumed that all the exhibits, wherever they were . . . I asked counsel, "Go over the exhibits. If you have any objection—"

MR. MONTANA: Yes, we did, Judge.

THE COURT: "—voice your objection, and the court will rule on it". And there were some.

MR. MONTANA: Your Honor is correct.

THE COURT: We talked about one or two exhibits, if my recollection serves me.

MR. MONTANA: Your Honor is correct, but the problem is that the exhibits that the government identified as going back to the jury room were the ones on the first bench in this courtroom, and they did not include the jury books.

MR. LYNCH: The jury books were never there, and it was my understanding that the jury books were going to be collected and taken back down to the U.S. Attorney's office, and never go back to the jury room.

THE COURT: Well, if, indeed, all those exhibits . . . I had assumed that perhaps one or two of the exhibits . . . I had [5996] assumed that all the exhibits were in evidence. What you are complaining about is that they are segregated and separate and apart from the other exhibits and highlight those exhibits. Is that your complaint?

MR. LYNCH: And there are twelve of each on top of the original exhibits.

MR. MONTANA: That's right. It selectively takes out those exhibits which the government feels is favorable to their case and encourages the jury by necessity to ignore the other exhibits.

MS. BOGART: Well, as a matter of fact, Judge, I mean, that is not true. And if Mr. Montana wants to put in those arguments, the government would be happy to respond. But the condition of the record, is such that in fact the loan files, as both the defense, and the government and the court is aware, we selected out certain documents which were, in fact, identified, and many of which were, in fact, put into the jury book from those loan files. And those documents are all segregated at the front of the loan file in jackets with specific numbers on them, whereas everything else in the loan files was not.

MR. MONTANA: There are a number of exhibits—

THE COURT: Well, here, again, we may have a moot issue. That can happen in two ways, two different ways that I can think of, as a matter of fact, three different ways that [5997] I can think of.

The question is right now, the court is concerned, before we get to that issue, which may never arise—

MR. MONTANA: Judge, just on that subject, however, we are going to also move that at the recess, whenever we break and the jury is excused for the weekend, that those jury books be collected, taken out of the jury room, and that the jury not be permitted to look at those jury

books for the remainder of their deliberation, because they have the exhibits and they can look at the exhibits. And those jury books should never have gone back to the jury.

THE COURT: Any objection to that?

MS. BOGART: I have no objection to that.

THE COURT: Fine. Okay. You know what that's going to do. It's just going to highlight the fact . . . they are going to say, "Where are the jury books?" You have no problem with that?

MR. MONTANA: Judge, my problem is how to solve something that shouldn't have happened. I mean, I'm astounded that this happened, and I'm trying to figure out the best way to do it to resolve the problem.

THE COURT: Is it stipulated that we remove the jury books from the jury room?

MR. LYNCH: I would so move.

MR. SHALGOS: I join.

[5998] THE COURT: So stipulated. Okay, we'll sneak in there after they leave without letting them know. Right?

MR. MONTANA: Absolutely.

THE COURT: And see what happens.

MR. MONTANA: They should not know at whose request this is, of course.

THE COURT: And then respond to any questions they may have as to the nonavailability of those jury books when they return Monday. Okay?

MR. SHALGOS: Okay, we'll see what happens.

THE COURT: And over the weekend, you can think about a response we can give them. Both the government and the defendants can prepare a response.

MR. LYNCH: Just tell them the government needed them on another case.

THE COURT: Just prepare a response.

What do we do with this jury today? Do we call them in? Just allow them to go until how long before we . . .

I will give you my thoughts. Given the complexity of the case and the length of the trial, the issues involved and all, I think a minimum of two weeks will be necessary for this jury to decide this case. That would be at least nine days of deliberation. And I would suggest that we not even ask them if they are close to a verdict until next Friday. But, I'm open to any suggestions.

[6002] * * * * *

(Jury excused for the evening.)

THE COURT: My original thought was correct. This jury will deliberate for at least another week.

MR. MONTANA: Your Honor, I would just say this. The solution of taking those jury books out at this stage, although it's at my suggestion, I don't intend to waive our position that it was error to let those jury books back there, and it should be a grounds for a mistrial, and I just want the record to reflect that.

THE COURT: But you all agree that the very least that we should do, irrespective of your positions, is to remove those jury books?

MR. LYNCH: Oh, yes.

MR. MONTANA: Oh, yes.

MR. LYNCH: We join in that motion.

THE COURT: All defendants.

[6005] * * * * *

THE COURT: Then what we will do, the court will not make an in camera inspection. The court will take those jury books, seal them pending the verdict of the jury. Okay?

MS. BOGART: Fine.

THE COURT: And then over the weekend, you may prepare any statement you want in the event the jury—and I'm sure they will ask us—asks, "Where are the jury books?" Are they still back there?

MR. MONTANA: I just want to make known our position that those jury books should never have gone back. It was represented to us that they wouldn't go back. And it is astounding that they did go back.

THE COURT: That record you've made, Mr. Montana.

[6007] * * * * *

(Court reporter assisting court security officer in packing jury books.)

THE COURT: Let the record show that pursuant to agreement of counsel, without waiving any defendant's rights to a claim of error because of the jury books going back with the evidence, the court has ordered the court room deputy to remove those twelve jury books from the jury and place them in a bag which will be sealed once the courtroom deputy brings those jury books in that bag out in open court. They will be sealed pending—

[6013] * * * * *

MR. MONTANA: Judge, the other thing I would like to know from the marshal is where did he get those jury books. How did those jury books get back to the jury room? The last time I saw them—

MR. LYNCH: They were underneath the chairs.

MR. MONTANA: —they were underneath the chairs.

THE COURT: Presumably, the government picked them up from underneath the chairs and said, "Marshal, this goes back". Is that correct?

MS. BOGART: Judge, along with a lot of other things—

THE COURT: Yes.

MS. BOGART: —we stacked them all in the back because the defendants had left. And we stacked them all in the back.

THE CLERK: He pulled out markers and notes from two of the books, but stopped as to the remainder.

MR. MONTANA: Judge, I just want the record to reflect that Ms. Bogart just said that after the defense left, she took the jury books from next to the jury chairs, and stacked them next to the other exhibits.

MS. BOGART: Well, Mr. Montana—

[6014] MR. MONTANA: Ask her.

MS. BOGART: Excuse me. —along with all the other evidence in this case because the defense had decided not to stick around for that purpose—

MR. MONTANA: Oh, no.

MR. LYNCH: No, no.

MS. BOGART: —and we were aiding the marshal in putting it all in the back of the courtroom so he could wheel the cart in and out.

THE COURT: That is the matter in which I said—

MS. BOGART: I understand.

THE COURT: —you will file some stipulations . . . some affidavits—we will reach that question once we're certain we have to reach it.

There COULD BE a not guilty in this case, Mr. Montana.

MR. MONTANA: I'm absolutely sure of that.

THE COURT: And all of it is moot.

MR. MONTANA: I'm just trying to do my best to protect the record, and to point out what I think to be outrageous that those jury books went back there, absolutely outrageous.

THE COURT: All right. He has stopped pulling slips out. I am reluctant, on second thought, I'm reluctant to do anything but just have all those books impounded.

Now, I assume what the jury has done without [6015] knowing is that they have made notes, they have gone through the jury books, discussed the evidence, and made certain notes to themselves. They may want those notes. You say, "Well, if they got them from that book, they shouldn't have those notes".

MR. MONTANA: I'm saying that the problem with what we're trying to do now—

THE COURT: I don't want to know what those notes are. I think that invades the province of the jury. I don't think the judge should know what deliberations of the jurors are. And that is, in effect, what I would be doing if I went and pulled out the notes.

MR. MONTANA: The problem with what's going on here, Judge, is we're trying to remedy something that is really not remediable, and points out to me that what should happen is a mistrial should be granted because we're trying to remedy something. Now the books are back there. They've got notes in the books. They think they should be able to look at those notes. We're taking the books and the notes away from them, which adds to their confusion, their consternation, and I don't know how they're going to react to all that. Nobody knows how they're going to react to all that. But all I know is that none of this should have happened, and it wouldn't have happened if those jury books hadn't gone back there. So what we're trying to remedy now is not something that can be [6016] remedied. And as we go on here on the record, I can see as we try to remedy it, all we do is compound it to the detriment of the defendants.

THE COURT: Tell him to put those books just the way they are without separating them, and not pulling out any of their notes, put them in that bag, and I want the bag when it comes out here to have a rubberband or a seal, and then I want you to tape it around with a note:

> "Sealed by the court pending further order of the court".

[6019] * * * * *

COURT SECURITY OFFICER: There's thirteen of them.

THE COURT: Let the record show that there are thirteen books. Let the record show that the Courtroom Deputy

has collected thirteen jury books and placed them in a Manila [6020] bag, and the court is in the process of sealing said bag. . . .

* * * * *

June 15, 1987

[6028] THE COURT: We have two notes from the jury as predicted. The first note:

> "9:25.
>
> "Judge Bua:
>
> "As a result of withdrawing the jury books . . ."

By the way, they asked . . . the events occurred this way. As soon as the foreperson, who was the very first person to arrive this morning, noticed the jury books missing, he came running in to my secretary and said, "Someone was in the jury room". And my secretary said, "Well, just write a note". I don't know if my secretary said, "No, no one was in the jury room" or, "It was the judge that took them out", but at any rate, we got a note back at 9:25 from Mr. Barker that says:

> "As a result of withdrawing the jury books, we left certain important notes which were inserted in my book.
>
> "We request . . ."

I can't read this . . . . something.

> ". . . take any yellow page notes back to jury room".

Apparently, what he wants, he wants to take those yellow slips from his jury book, and I would assume that all the jurors, members of the jury, would want to do the same thing.

I ask you if you can agree on how we handle that one.

[6029] MR. MONTANA: Judge, I think it is apparent that the jury has relied upon those books which were brought into that jury room improperly. It's apparent because of

their concern now and their wish for the jury books or at least—

THE COURT: They are not asking for the jury books. They're looking for the slips.

MR. MONTANA: The first thing that happened, your Honor, when the foreman got there was that he ran in to your secretary and asked for the books, so it is clear to us that they have been relying upon those books during their deliberations, books which they never should have had to begin with.

Secondly, it's clear, since they have made notes on what is in those books, that they're relying upon those books.

So there is no question—this is what I tried to say Friday—that in trying to solve this problem, we're going to make it worse, and we have made it worse.

They have now been deprived of those books which they shouldn't have had to begin with. So we think what we need to do is to declare a mistrial right now because they should not have had those books, your Honor.

THE COURT: Well, that motion will be denied.

MR. LYNCH: I join in it, Judge.

THE COURT: All parties join; all defendants join, and it will be denied.

[6038] * * * * *

THE COURT: How do you want me to respond to the foreperson asking for his yellow-page notes?

MR. MONTANA: Judge, we feel very strongly that those notes which were in his jury book and, obviously, based upon the jury book not be returned to him.

THE COURT: I understand. But how would you respond? What would you tell the jury? "You can't have them"?

MR. MONTANA: Well, my problem is that . . . I guess I'm repeating what I said earlier. My problem is that this

problem that was created by the government is now becoming insoluble to the detriment and prejudice of the defendants. And that is why I think there ought to be a mistrial granted right at this second.

THE COURT: Do you want to bring some authority in?

MS. BOGART: I will bring in some authority, Judge, because I do think it is improper to keep their notes from them that they have been making during their deliberations.

MR. MONTANA: I was improper for those books to go back, and the government caused that problem. We are willing right now to have a hearing on that issue.

THE COURT: Well, I think, here again, it would be a serious issue, obviously, and I would declare a mistrial at the snap of a finger in the event the jury did not have that jury book on their laps for almost two months, and, also, if, [6039] indeed, the exhibits appearing in the jury book were not exhibits actually received in evidence. I'd have no problem with it. I don't think it is a proper reaction for the court to declare a mistrial just because this evidence has been compiled in one "jury book".

MR. MONTANA: Judge, it's compiled in a way favorable to the government, and it is encouraging to the jury—

THE COURT: That's an argument you are going to have to make in the Seventh Circuit and convince them in the event the occasion ever arises, unless you have a case in point.

MR. MONTANA: Well, Judge, I don't have a case in point, but a general principle, which is that nothing should go back to the jury room that is improper to go back to the jury room. And those jury books, it's improper for them to go back, plus the government did not identify those—

THE COURT: The rule is still that the error must be prejudicial. Isn't that correct?

MR. MONTANA: Yes. But we don't know whether it is prejudicial or not because we can't go into the jury room and ask them—

THE COURT: But your argument is it becomes prejudicial per se by virtue of the fact that albeit they are exhibits received in evidence, they are compiled in one book. Is that your argument?

MR. MONTANA: No, no, Judge. Yes. I will tell you [6040] what—

THE COURT: That's your argument.

MR. MONTANA: —my argument is. Because it encourages . . . no, no, there's more to it. Because it encourages them not to look at the other exhibits. Secondly, those jury books were not identified by the government to us as going back to the jury room.

THE COURT: That you made your record on.

MR. MONTANA: Well, Judge, you have to consider that impropriety. That's an impropriety. That was totally improper for the government to do that.

THE COURT: But not prejudicial.

MR. LYNCH: Oh, Judge, it is prejudicial from this standpoint that they obviously had utilized the jury books as the weatherbell for their negotiations. That weatherbell leaves out all of the documents that are truly favorable to the defendants and concentrates on the theory of the prosecution, and I respectfully suggest that the way the jury book was laid out was to attempt to simplify, if you will, the presentation by the government to the exclusion of the defendants' defense.

I think it is very, very prejudicial because what it is is it is kind of tantamount to having a short form prosecutorial presentation for each member of the jury. And as Mr. Montana has said, the records themselves, all the [6041] records that are in evidence, have materials in them

that truly explain away these other materials, such as, to give you an illustration, it's true that my client—

THE COURT: I understand your argument. Are you saying, Mr. Lynch and Mr. Montana, that . . . let's assume there is a verdict in this case and let's assume it is a guilty verdict. Do I understand correctly that what you would ask the court to do is to bring the jury in and ask them if, indeed, they utilized the jury book to the exclusion of all the other evidence in the case, and then in the event they answered, "Yes, we did", then the court must declare a mistrial?

MR. MONTANA: Judge, my position—

THE COURT: Or are you asking the court that what the court should do is just assume that that's what they did and declare a mistrial?

MR. LYNCH: Well, I think the evidence is pointed in that direction when the foreman comes in and says, "We need our jury books" the first thing on a Monday morning.

THE COURT: He doesn't say . . . oh, I see. What he wants now is his notes—

MR. LYNCH: Right.

THE COURT: —that he just had in his jury book.

MR. MONTANA: Your Honor indicated that the first thing this morning, he came in and complained to your secretary [6042] that the jury books were not in the jury room and—

THE COURT: He was concerned that someone invaded the sanctity of the jury room and took the books out. That was his concern.

MR. MONTANA: Okay, Judge, but those jurors have been looking at those books. It is the natural reaction when they've got nice twelve things in front of them—

THE COURT: Oh, by the way, there were two extra books in the corner. By the way, where are those?

THE COURT REPORTER: I sealed them and put them with the others.

THE COURT: Did you seal them?

THE COURT REPORTER: Yes, I did and placed them with the others.

THE COURT: Once the foreperson learned why they weren't in there, he said, "There are two more over in the corner". No yellow slips in them?

THE COURT REPORTER: I did not look.

THE COURT: You put them in brown paper and sealed them just as we did the others?

THE COURT REPORTER: Yes.

THE COURT: Without looking at them?

THE COURT REPORTER: Yes.

THE COURT: Fine. So we have two more jury books. There were apparently fifteen jury books in there.

[6043] MR. MONTANA: Yes, fifteen.

MS. BOGART: There should have been sixteen.

MR. MONTANA: Oh, there should have been another one in there, Judge.

MS. BOGART: There was one for every juror and alternate when they were passed out and used.

THE COURT: We sealed thirteen last Friday—

THE COURT REPORTER: —and two more this morning.

THE COURT: —and two more this morning, fifteen.

MS. BOGART: Judge, I obviously have a counterargument which, when the motion is filed, I will be happy to put in writing with respect to all the arguments that are being made on these jury books.

THE COURT: These arguments are made in support of a motion for a mistrial at this time. For the reasons stated by the court, they are denied.

MR. MONTANA: Judge, we ask for an immediate hearing on that. We ask for an immediate hearing with testimony.

THE COURT: That will be denied until after the jury's verdict one way or the other. It may be moot. And, indeed, if it's not moot, we may conduct an in camera examination of the jurors with counsel present as to how these jury books were utilized.

MR. MONTANA: Judge, you won't know that unless you were to actually interview the jurors.

[6044] THE COURT: Yes, and that's what I intend to do, one at a time, separate and apart from the others . . . .

[6058] * * * * *

THE COURT: . . . . Why don't we just see what happens, and say nothing. If they insist on it and say, "We want them", then I'm going to have to bite the bullet and I'm going to have to decide. But I intend to do nothing at this time.

[6062] THE COURT: We have a verdict, ladies and gentlemen. Will you bring in the jury please?

(Jury present at 3:25 p.m.)

* * * * *

June 16, 1987

[6141] MR. MONTANA: First, I want to tell you about what happened on June 8, and June 9, with respect to the jury books.

First of all, with respect to the jury books, we can all agree that they are a selective compilation done by the government of documents which, from the government's point of view, see things from the government's point of view prepared by the government to demonstrate the defendants' guilt.

Now, on June 8, 1987 . . . and, your Honor, whatever I'm going to cite here in terms of the facts, I offered on Friday, last Friday, to testify to these facts. My offer still stands. I'm willing to testify to those at a hearing, and I'm willing to have Ms. Feibus testify to these events.

Mr. Lynch is willing to testify to these events. We're willing to do that. And we offered to do that last Friday. We make the same offer now.

But I will tell you what we would testify to if allowed to testify.

On June 8, after the completion of the arguments and instructions to the jury, the court ordered the parties to return the next day at 8:45 a.m. to resolve any issues concerning the exhibits to be considered by the jury. [6142] The parties agreed to meet at 8:00 a.m. on June 9, in the courtroom to review the exhibits which each party proposed to submit to the jury for their review during deliberations.

That evening, the evening of June 8, and the morning of June 9, I expressed to Susan Feibus, my co-counsel, my concern that the government might attempt to have the jury books go back to the jury. I said that it would be highly improper, and if they attempted to do so, we would object strenuously.

On June 9, 1987, at 8:00 a.m., as instructed by the court, George Lynch, Leland Shalgos, Susan Feibus, and I arrived at 8:00 a.m. in the courtroom. At that time, the jury books were located in the jury box as they had been throughout the trial. There was one jury book next to each juror's chair.

Shortly after 8:00 a.m., Special Agent Peters arrived with the government's exhibits. There were approximately ten to twelve boxes filled with government's exhibits.

Agent Peters unloaded the boxes in a row onto the first spectator bench, this bench right here (indicating). The boxes were unloaded on this bench (indicating).

Agent Peters did nothing with respect to the jury books.

Mr. Lynch, Mr. Shalgos, Ms. Feibus and I began to [6143] review the government's exhibits. I asked Agent Peters if the boxes on the spectator bench, which he had

just unloaded, were the exhibits the government intended to submit to the jury. He said, "They were". At no time did Agent Peters ever say to me, directly or indirectly, that the government intended to submit the jury books to the jury.

At approximately 8:20 a.m., Susan Bogart arrived. From 8:20 a.m. until approximately 8:45 a.m.—between 8:45 and 9:00 o'clock, I think, when your Honor came out on the bench, when you came out on the bench—during that time period, from about 8:20 until you came out on the bench, Mr. Lynch, Mr. Shalgos, Susan Feibus, and I continued to review the government's Exhibits contained in the boxes on first spectators' bench.

During that review, we discovered several government exhibits which had blue or yellow sticker tabs attached to them, several of which were highlighted with yellow ink, several of which related to subsequent litigation. Ms. Bogart agreed to have the blue and yellow sticker tabs removed. She agreed to have Agent Peters re-Xerox the exhibits which were highlighted with yellow ink, and she agreed to remove certain documents from the loan files which appeared to relate to subsequent litigation.

During this review, I asked Ms. Bogart whether the boxes on the spectator bench contained all of the exhibits [6144] the government intended to go back to the jury. Ms. Bogart responded, "Yes, that's right".

At that time, the jury books were not on the spectator bench, but they were still in the jury box next to the jurors' chairs.

Also during this time, Susan Feibus, my trial counsel, said to me, "I just asked her", meaning Susan Bogart, "if she intended that the jury books go back to the jury, and she said, 'No'."

I said to Ms. Feibus, "Good! Then we don't have to worry about it".

Also, during this review, Ms. Bogart reviewed the defense exhibits. During her review of Defendant Bewick's exhibits, she noted that one of the exhibits was highlighted in orange ink. She pulled that exhibit, and I agreed that it should be re-Xeroxed, and that the recopied exhibit should be substituted for the highlighted exhibit. Ms. Bogart agreed to take the exhibit down to the 15th floor to re-Xerox it and return it to court for reinsertion back in the Bewick exhibits to go to the jury.

The defense then completed its review of those exhibits which the government identified as being the exhibits it intended to go back to the jury. All of those exhibits were in boxes on the spectator bench. At no time did Ms. Bogart or Agent Peters ever state or imply that the [6145] jury books would be submitted to the jury. In fact, in the presence of the defense attorneys, Ms. Bogart or Agent Peters never placed the jury books on the spectator bench with the other government exhibits to be sent to the jury room for inspection by the defense. And Ms. Bogart specifically told Ms. Feibus that the jury books would not be sent to the jury.

After the defense's review of the government's exhibits and the government's review of the defense's exhibits, your Honor came out on the bench.

And then, your Honor, I think your Honor was given a partial transcript of what occurred at that point.

THE COURT: I have it, yes.

MR. MONTANA: Basically, I think, you asked if all the questions as to the exhibits had been resolved. I replied, "Basically, they had".

And then there was a question as to one exhibit. You then ruled that that exhibit should not go to the jury. And then you said that you wanted the exhibits agreed upon to be placed at that desk to your right in the custody of the U.S. Marshal.

And then we have this transcript, your Honor, which is very, very revealing. At 9:18, your Honor—this is what the transcript shows—on June 9, 1987, you came out and I said:

> "We're going through the exhibits. I don't think we're going to have [6146] any problems that we need to resort to the court to, but I can't speak for everybody".

That is, your Honor, because the only exhibits that were ever told to us that were going to the jury were the ones on that spectator bench. Those jury books were still next to the chairs in this jury box. Nobody said a word to us. So I thought everything was resolved.

And then, your Honor, you will note Ms. Bogart says at page 2 of the transcript:

> "There are three documents here that have to be recopied because they have markings. If there's no further business, I'm going to run down and make clean copies of the exhibits, of the defense exhibits, that were marked, and then I'll be right back up."

That's referring to those exhibits that I told you about in my statement, your Honor.

Now, your Honor, at page 3 of the transcript, you say:

> "Are the government's exhibits segregated now?
> "Ms. Bogart: Yes, Judge.
> "Mr. Montana: Yes, your Honor."

And you know where they were segregated, Judge Bua? They were segregated right on that bench. There were no jury books on that bench. The jury books remained next to these chairs. So when Ms. Bogart answers the court:

> [6147] "Are the government's exhibits segregated now?"
> "Yes, Judge."

she's talking about, and everybody understood it and knew it, the boxes that were on the spectator bench, not the jury books.

And then you will see that you say to the parties:

> "Put them on this desk here, and the marshal will make them available to the jury. Not yet, though, until Ms. Bogart brings up those documents."

So the only thing that was left to be done was Ms. Bogart to come back with those documents that were defense exhibits that she had agreed to re-Xerox to eliminate the highlight, and that was all that remained to be done.

There were no more questions to resolve as to what exhibits would go back to the jury. The defense had reviewed the exhibits which the government had proposed to submit to the jury which were lined up in boxes on the spectator bench. There was nothing more for the defense to do. There was nothing more for the government to do except to get those other exhibits re-Xeroxed, which were defense exhibits, and to take the boxes that were on that spectator bench and place them on the desk to your Honor's right, and put them in the possession of the marshal for submission to the jury.

The government in our presence never placed the jury books anywhere for our inspection as being exhibits to [6148] be tendered to the jury. Never! They never placed them on the spectator bench. And when we left, your Honor, we left because our job was done, as your Honor notes in this transcript.

THE COURT: By the same token, they were not placed on the table next to the court's bench.

MR. MONTANA: I'm sorry?

THE COURT: By the same token, you're saying the government did not place the jury books on the table next to the court's bench.

MR. MONTANA: Absolutely not.

THE COURT: Okay.

MR. MONTANA: If they did it, it was after we left. Mr. Lynch, Mr. Shalgos, Ms. Feibus and I left the courtroom because there was no more to do. At the time we left, the government's exhibits were in boxes lined up on that spectator bench awaiting removal to the desk next to you so that the U.S. Marshal could take them into the jury room. The jury books remained, as they had been since 8:00 a.m. that morning and since they had been during the whole trial, each one located next to the juror's chair in the jurors' box. At no time did I, Ms. Feibus, or as I understand, any defense attorney agree or consent to the jury books going back to the jury room. In fact, had the government proposed that, I would have objected strenuously because those books [6149] contain only a selection of government exhibits prepared by the government to demonstrate the defendants' guilt, and it was patently improper for those books to go back to the jury room.

And I'll tell you what happened, Judge. When we left this courtroom, someone from the government, either Ms. Bogart, or Agent Peters, or somebody, gathered those jury books up and had them sent back to the jury room. That, I submit, was patently improper. They knew darn well that the boxes that had been lined up on the spectator bench were the government's Exhibits, not the jury books. They weren't lined up for our inspection, and they never told us that, and, in fact, Ms. Feibus will testify that Ms. Bogart said that they weren't going to ask that the jury books go back to the jury room. Okay? So they DID go back to the jury room. It was improper for them to go back to the jury room.

I submit, your Honor, it was intentionally improper, and I have no hesitation in saying that. I think the record supports it based upon the transcript, based upon the statement, and I'm willing to testify to it under oath that

what happened here is that they waited until we left, and then they intentionally let those jury books go back to the jury room. And those jury books are nothing but the government's "brief" in support of its request that the jury find the defendants guilty.

[6150] And what happened, your Honor, is that the jury deliberated from Tuesday . . . all day Tuesday, all day Wednesday, all day Thursday, and all day Friday with the benefit of those jury books, and it wasn't until Friday afternoon, late in the afternoon, that we discovered that those jury books went back there. And when we made our record, your Honor ruled that the jury books should come out. And what was the first thing—

THE COURT: I think that was a compromise position after we discussed it.

MR. MONTANA: Judge, I didn't waive our position that your Honor should have ordered a mistrial immediately.

THE COURT: No question about it, you didn't waive your position. But rather than a ruling, I think it was a compromise position. The government had no objection to removing them at that time. But at any rate—

MR. MONTANA: And it is my view and it was my view at the time—

THE COURT: —the transcript will reflect that.

MR. MONTANA: —as we thought about it, that the discussion about it, and what we tried to resolve and solve it only compounded the problem. And I think that is exactly what happened because the first thing Monday morning when that jury discovered that those jury books weren't back there, the foreman ran into your office and spoke to your [6151] secretary and said, "Somebody without authority has removed these jury books" because they had come to rely upon those jury books, and, now, suddenly, they weren't there, and then within an hour or two, they reached a verdict after Friday afternoon—remember,

Friday afternoon, when they came in here at 4:30 when your Honor brought them in, your Honor said, "Have you been able to reach a verdict?" And the jury foreman said, "No" in a voice just like that.

THE COURT: No, I think not. He said, "No" and was beginning to say something else when I stopped him. That's my recollection. But, again, the—

MR. MONTANA: That is not my recollection. My recollection is that it was a resounding, "No". A resounding "No".

THE COURT: Again, the transcript will disclose . . . I don't know if it will disclose that the "No" was resounding, but my recollection was he said, "No", and started to say something, and then I interrupted him. I said, "No, just answer 'yes' or 'no' ". But go ahead, Mr. Montana.

MR. MONTANA: The point is that we now have a situation where those jury books should not have been in the jury's possession. They should not have been deliberating with those jury books, and we know that it happened. Okay. We do not know the effect on the jury, however. Except I think that there is a reasonable inference that can be [6152] drawn from the fact that the jury books apparently had notes in them that they made use of those jury books to the exclusion of other evidence, to the exclusion of all the other documents, including the other documents that were contained in the loan files, the other documents in the trust files, the other documents such as the certification that Mr. Ryan was the sole beneficiary of the land trust. All these other documents which are helpful to the defense, I think it can be inferred that they did not look at them.

And, your Honor, I think it is incumbent upon this court to conduct an examination of the jurors, one by one, in our presence, asking them questions concerning what use

they made of the jury book while it was in their possession in their deliberations, questions concerning whether or not they resorted to the jury book to the exclusion of other exhibits, and to what extent, what their reaction was and what did they think when the jury books were taken away from them as they were on Monday morning. I think those questions have to be resolved. I think that unless they are resolved, the record is incomplete. I think we have been denied our rights to a fair trial. I think that there has been an improper submission to the jury in an intentional way by the government of things that should never have gone to the jury.

As I said to the court when I found out about it [6153] on Friday, I was astounded that that had happened . . . astounded. Because there was never any question that those jury books were going to go back to the jury . . . never. It was never suggested. They were never segregated.

Your Honor makes very good note. You said in the transcript:

"Are the government's exhibits segregated now?"

and Ms. Bogart says:

"Yes, Judge."

and I say:

"Yes, your Honor."

And we're talking about the boxes that are on that spectator bench. Those were the exhibits to go back, not the jury books that were next to the jurors' chairs in the jury box.

And, your Honor, as I say, I'm willing to testify. I will testify right now under oath to everything that I've said. Ms. Feibus is here. She is willing to testify. Mr. Lynch can corroborate that.

THE COURT: It may not be necessary depending on how the government responds.

Mr. Lynch, do you have anything to add?

MR. LYNCH: Yes, Judge. I would like to make my offer of proof just to support the record at this time. If I were called to testify under oath, I would testify that on [6154] June 9, 1987, I appeared with other counsel, defense counsel, in the courtroom at 8:00 o'clock by prearrangement to go over the exhibits in this particular case before presentation to the jury. There was myself, Mr. Shalgos, Mr. Montana and Ms. Feibus.

After a short period of time, Agent Peters came up with the government's exhibits and placed them on the first row on the left-hand side of the court as the court looks at the spectators area. He placed the boxes, approximately a dozen boxes, in a row, ten or a dozen, somewhere in that area.

We began going through the boxes document by document, removing those items which we believed were prejudicial and should not have been in evidence or had been altered in some way.

While doing that, I decided that there were too many people standing there going through the boxes, so I took one or two files and sat in the first seat of the first row of the jury box as one looks at the jury box on the right which is adjacent to the bench where the exhibits were. And I began removing exhibits from two files that I had that related to litigation which had nothing to do with the particular case in question, litigation that was 1984 and 1985 litigation.

Ms Feibus came up to me. The jury books were [6155] at . . . as a matter of fact, in the front row, they were on the rail or between the rail and the front board along the front. She came up to me and asked me about the particular books. I asked her, "What are we going to do with these? Are these going into evidence?" And she said, "Let me check." Bogart was right behind her at the

boxes. She walked up and said, "Are you going to seek to have those books sent back to the jury?" She said in a loud and clear voice, "No".

I continued with my work at that position which was, again, over in the jury box.

Shortly thereafter, Ms. Bogart began looking at our exhibits on the bench to the right in the first row. I walked over where Mr. Montana was to see what she was doing in relation to my exhibits and to find a suitable container to put the exhibits in when we put them back.

Shortly thereafter, his Honor came on the bench. And some time after 9:00 o'clock—and in looking at the record, I see that it was 9:18 as recorded by our court reporter—the court said:

"Place your exhibits on the desk" to your right. We placed them there. And there was a colloquy as evidenced by the transcript in which Ms. Bogart said and Mr. Montana said all the exhibits were segregated. And none of the trial books had been placed on the front [6156] bench. We didn't expect them to be because she had already said they weren't going to go back, and they weren't going to seek to send them back to the jury.

That was our position. And we left.

THE COURT: Thank you. Mr. Shalgos, do you wish to add anything?

MR. SHALGOS: Very briefly, your Honor. I don't think there is much that I can add to what Mr. Montana or Mr. Lynch said, but I have no recollection of any conversations taking place because I was off by myself. I had come in at approximately the same time as Mr. Lynch and Mr. Montana indicated.

And shortly after I arrived, I went over to the boxes that were on the front bench, and I pulled the box containing the Kings Point loan files. I took that box over to the counsel table, and placed it at the west end of the

defense counsel table, and that's where I was going through the Kings Point box.

I can tell you this. I was privy to no conversations, but I can say this. When I brought that box back just prior to the time that the colloquy took place that is reflected in the record and placed it back on the front bench, there were no jury books on that bench. And that was just a short period of time before we had the colloquy up here about what I was going to do with my exhibits.

THE COURT: You join and I assume Mr. Lynch joins in [6157] Mr. Montana's request that the jurors be voir dired individually so that we can determine what use, if any, they've made of those jury books?

MR. SHALGOS: I do, Judge.

MR. LYNCH: We do join, Judge.

THE COURT: Very well. Thank you.

[6163] * * * * *

MR. MONTANA: While your Honor is perusing those things, I think Ms. Feibus would like to make an offer of proof with respect to what her testimony would be with respect to this subject.

MS. FEIBUS: May I proceed, your Honor?

THE COURT: Sure.

MS. FEIBUS: My offer of proof with regard to this issue is there had been numerous discussions between Mr. Montana and myself regarding our position that the jury books should not go back to the jury, and, as a result, we had discussed [6164] repeatedly needing to make sure that morning, meaning June 9, that there was no intention by the government that those books would go back to the jury, and if the government expressed the intent, expressed that it was their intention that they would seek that those books go back to the jury, it was our plan that we would strenuously object to that position.

When we came in on the morning of June 9, at 8:00 o'clock, at that time, the jury books were strewn next to each of the chairs as they had been during the entire course of the trial.

At some point when we were reviewing the government's exhibits, based upon Mr. Montana's and my previous discussion about the jury books, I was standing towards the back of the government table on the right-hand side, and I said to Ms. Bogart, "Is it your intention that you will seek to have these jury books go back to the jury?" She said that, "It was not her intention".

I then immediately walked over to where Mr. Montana was standing and said to him that, "I spoke to Ms. Bogart, and they're not going to seek to have the jury books go back". As a result, the issue never was raised.

I will further state—

THE COURT: The jury has reached their verdict. Go ahead.

[6165] MR. MONTANA: May she just finish, Judge?

THE COURT: Sure.

MS. FEIBUS: At the time that we left this courtroom, as the other counsel have said, the defendants' exhibits were lined up on the first row of the spectators bench . . . excuse me, the government's exhibits were lined up on the first row of the spectators bench on the court's left-hand side of the courtoom. When we left this courtroom at close to 10:00 o'clock, the jury books were still next to each of the juror's chairs as they had been throughout the course of the trial and as they were that morning.

MR. MONTANA: And, Judge, everybody understood at that time our job was done. There wasn't anything more to do.

[6177] * * * * *

MR. MONTANA: . . . I don't think it was proper to begin with for this jury book, being what it was, to go back to the jury room, I don't think it was proper given the circumstances under which it went back there, which was without our consent and without our knowledge and contrary to Ms. Bogart's representations. And to make matters worse, we now have a situation where they went back to the jury room with two exhibits not being in evidence at all. And for all those reasons, your Honor, the verdict ought to be vacated and a mistrial declared. And whether or not there is a retrial, I think, would depend on further findings. But, certainly, at the minimum, the [6178] verdict ought to be vacated.

MR. LYNCH: We join in all of those motions, of course, Judge.

MR. SHALGOS: As does the Defendant Conarty, Judge.

THE COURT: The motion for a mistrial will be denied. Ms. Bogart, do you want to respond?

MR. MONTANA: Well, Judge—

THE COURT: I'm interested in only one question. I want a response first from the government.

MS. BOGART: Judge, without going into a response on each of the individual statements that Mr. Montana made, or Mr. Lynch, or Mr. Shalgos, I believe that Rule 606(b) of the Federal Rules of Evidence governs whether or not the jurors should be examined individually, or collectively, or otherwise. And that provides, very clearly, Judge, that jurors should not be questioned and are not, in fact, competent witnesses under certain circumstances, that the only time that they should be called upon under 606(b) to testify is given here:

> ". . . except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention

> or whether any outside influence was improperly brought to bear upon any juror."

I see that as requiring basically three steps of proof. One is whether there was anything extraneous brought [6179] into the jury room. Two, if that is met, whether that—

THE COURT: Your opponents would argue that the jury book, indeed, was extraneous matter brought into the jury room.

MS. BOGART: Assume that that's correct—

THE COURT: Yes.

MS. BOGART: —then the next question is whether it is prejudicial. Under the case of *United States v. Bassler*, a case which cites a Seventh Circuit opinion, and it is an Eighth Circuit opinion at 651 F.2d 600, the court says, the Eighth Circuit says:

> "The trial court was proper when it followed the dictates of Rule 606(b) by preventing any examination into the effect that this extrinsic material had on the mental processes of the jurors".

It assumed a certain set of notes that a juror took from a book that had been obtained from a library and not in evidence was extrinsic evidence because the book had not been offered into evidence.

The court there cited a number of cases in support of that particular proposition or holding and went on to say:

> "Because Rule 606(b) precludes the district court from investigating the subjective effects of any extrinsic material on the jurors, whether such effects might be shown to affirm or negate the conclusion of actual prejudice, a presumption of prejudice is created and the burden is on the government to [6180] prove harmlessness".

I think that proposition or that statement, Judge, says that the jurors are not to be inquired of, that if we as-

sume, which we are not prepared to concede, that this book is extraneous or in some fashion contains extraneous evidence, that is a different matter, and we can make that decision without the jury and hold a hearing on that if the court deems it is appropriate, but they don't have to be, they shouldn't be, I think we are precluded from asking them questions about the deliberations.

THE COURT: I have only one concern—and I know the case you cite; as a matter of fact, we went through some of these cases in connection with the trial I adverted to earlier—there is only one concern I have, and that is the argument—I agree 606 doesn't require us to conduct a hearing—except for the argument that your opponents make that if, indeed—and I know of no other case like this—if, indeed, these books were sent to the jury room without the agreement of counsel, and they were not received in evidence, at least the jury book in its entirety was not received in evidence, you concede that . . . or do you?

MR. MONTANA: There is no question, Judge.

MS. BOGART: I don't recall that we didn't offer them, Judge, and I do know—

MR. MONTANA: I do recall that the jury books were [6181] never marked as exhibits.

MS. BOGART: —there was no objection to the jury books going in.

MR. LYNCH: We were told they were not going in.

THE COURT: Are you prepared—

MS. BOGART: I don't want to go into that at this point. I think that is a subject for a different day.

THE COURT: Well, if, indeed, there was an agreement that they go back to the jury room, they would have no basis for complaint.

MS. BOGART: I agree.

THE COURT: Is that correct?

MS. BOGART: That's right, Judge.

THE COURT: That's the threshold issue, then, isn't it?

MS. BOGART: I don't think so.

THE COURT: I think it is.

MS. BOGART: I think that you have to examine—

THE COURT: You see, my concern, as I started out to say, is that if, indeed, the jury books, if I take all the allegations of your opponents as being true, and you say, "Oh, no, they're not going in the jury room, the books", and then someone later from the government just collected these books and just dumped them in there, okay, assuming that, then I think the defendants might have an arguable position that: Since we didn't agree to their going in evidence, [6182] they were not received in evidence—as a matter of fact, we went to great strides to be certain that the jury would not look at any of the exhibits unless they were directed to by the court if you recall during the course of the trial—my concern is the effect it would have on the jury. If, indeed, they looked only to the jury books to the exclusion of all the other evidence in the case, then I think I would have to grant a mistrial, if, in fact, the jurors . . . and I would be willing to take briefs on it.

MS. BOGART: I disagree with that.

THE COURT: What I would like to do is to preserve the record. Once we let this jury go, there is no way we are going to be able to get them back and voir dire them. I would like to bring in these jurors one at a time in chambers, and ask them one question, not three questions as Mr. Montana suggests: "Whether they utilized these jury books to the exclusion of all the other exhibits in evidence in the case?" That is the only question I want to ask because if, indeed, they did, then I think there may be a problem.

MS. BOGART: Well, you know, Judge, on that point, I mean I think there is a variety of arguments to make. Even if you assume that that's true, I still think you have to undergo—

THE COURT: Did they utilize just the jury books—

[6183] MS. BOGART: Just the jury books.

THE COURT: —in determining their verdict.

MS. BOGART: Right. I mean, assuming that every document in that jury book is in evidence—

THE COURT: That's the next question.

MR. MONTANA: Well, your Honor—

MS. BOGART: That's the next question. I mean, there's a variety of questions. I don't believe that just because you take . . . even if you were to assume that the only thing that the jury used was this jury book that you a fortiori have to conclude that a mistrial is appropriate, because I can say this much there is in this—

THE COURT: All right, let's assume that that is true.

MS. BOGART: That is true.

THE COURT: The point is if we don't conduct a voir dire, though, we'll never get to the other point.

MS. BOGART: Well, I—

THE COURT: Do you understand the court's reasoning?

MS. BOGART: I do understand the court's reasoning.

THE COURT: You're saying, "Even if the jury says, 'That's right. We looked at nothing else, just these jury books' " . . .

MS. BOGART: Right.

THE COURT: You're saying, "Even then, a mistrial is [6184] not mandated". Is that correct?

MS. BOGART: That's right.

THE COURT: But we won't know this, will we? How would the court know whether, in fact, they utilized just

this jury book in order to come to their decision to the exclusion of all the other evidence?

MS. BOGART: But I don't think, Judge, that the inquiry is an appropriate one. I think the rule says, in fact, that the inquiry should not be made. And there has to be some . . . I mean, whether or not they used it as a guide in their deliberations is a different matter as to whether or not they sat here on a daily basis and listened to the evidence, the witnesses. I mean, you can't assess that sort of circumstance—

MR. MONTANA: Judge—

MS. BOGART: —by virtue of the use of a set of documents. And the fact of the matter is, despite Mr. Montana's arguments that this is a government brief, it isn't. Some of the government's Best documents are not contained in this book. And, indeed, on the one count that the jury acquitted, it would have been my suggestion that if only the government chart as to what happened to the money in West Chicago had been in evidence and not all of these documents, there would have been no basis for acquittal. I mean, I think that there is a variety of ways in which you can [6185] read this book. And Mr. Montana's argument, you know, is exactly that. There has been no examination of this book, Judge, from the standpoint—

THE COURT: Well, I would—

MS. BOGART: —of whether or not it advances most persuasively the government's case. That is not the fact. And, indeed, this book was used as often by the defense in directing the jury's attention to documents in this book as it was by the government. So I don't think that that argument can be made.

MR. MONTANA: I don't think that is true, your Honor. That book is compiled by the government, and if you go through there, it is like following, "Let's follow the in-

dictment along, Step 1, Step 2". That book is just a deliberate compilation—

THE COURT: Out of an overabundance of caution to preserve the rights of the defendants to a fair trial, I'm going to call each one of these jurors in separately with counsel present, and I'm going to ask them a question. If we can agree on the question, fine; if not, the court will ask its own question—

MR. MONTANA: Well, Judge—

THE COURT: —whether they relied solely on this jury book in reaching their decision in this case to the exclusion of all the other exhibits in evidence in the case.

[6186] MR. MONTANA: Judge, the problem with that question as it stands alone is that, you know, it may be that they relied upon one or two other exhibits or took a glance at other exhibits, but what if their principal reliance was on the jury book, and they looked at SOME of the other evidence, but not very much, but they principally relied upon the jury book, we have the same problem. We have the same problem.

THE COURT: Mr. Deady wants to say a word before he leaves the employ of the United States Attorney.

MR. DEADY: Your Honor, the concern of the government is primarily that if the court is going to do the inquiry that it proposes, the danger, exactly what Mr. Montana is seeking to have the court do, is to really inquire about—

THE COURT: —their mental processes.

MR. DEADY: —their mental processes and the subjective and the secretive nature of their proceedings which Rule 606 essentially provides and protects. What the court is allowing to be done is to inquire about that deliberative process. What the cases talk about in Rule 606, where there has been limited inquiry, is when there is some piece of paper or something that was left in the jury room

or some comment made by a marshal or someone who found out that he was in the presence of the jury, and there then had to be some initial determination as to whether or not that particular piece of evidence or that [6187] statement that was made inadvertently in the presence of jurors had any effect, first of all, whether they heard it or reviewed it, and, lastly, whether or not they actually relied upon it or used it during the course of their deliberations. I mean, that is separate and apart from whether or not they . . . there is no question in this case that these particular books were in the jury room and were used by the jurors. To the extent that they were used and to what purpose they were put is a matter that I don't think the rule provides for the court to inquire on. And the government . . . at least the *Bassler* case that Ms. Bogart cited talks about a presumption that if there is extrinsic evidence that is somehow included in that, then the burden is on the government to establish that whatever error there was was harmless in the course of deliberation.

There have been examples in the Seventh Circuit where highly prejudicial evidence or documents that were not in evidence somehow found their way to the jury room, and even the Seventh Circuit has found that in those contexts where it is highly prejudicial, the question is still up to the court not to inquire of the jurors as to what effect it had, but only as to whether or not they actually saw the documents. And the government in this case is prepared to concede that these books were in there, they were probably used by the jurors. Whether or not they were used to the [6188] extent . . . or to what extent they were used, I don't think is an appropriate inquiry by the court even in the limited context that your Honor is suggesting.

MR. MONTANA: Judge, I think the question is appropriate. I think we have a very serious problem here. We have the unwarranted intrusion into the jury room of, in effect, the government's brief in support of its case without the consent or approval of the defense, and, in fact, contrary to the government's representation to the defense.

MR. DEADY: Judge, that is a separate inquiry. If you want to have an evidentiary hearing with respect to whether or not Ms. Bogart, or Agent Peters, or the marshal, or whoever it was that actually physically took those books back and placed them in the jury room, that is a determination with respect to government misconduct that could be made independent of any inquiry upon the jury deliberations. And if the court wants to conduct a hearing when all the parties and the witnesses are available that can testify about those events, and whether or not Ms. Bogart did or did not make certain representations to defense counsel, that would be appropriate for a hearing at a later date prior to sentencing in the case. But I don't think that—

THE COURT: The only problem is, indeed, later, after such a hearing, Mr. Deady, I determine, indeed—and, here, I'm not finding, obviously—the government intentionally [6189] actually deposited those jury books in there in order to prejudice the defendants and in order to overcome a very difficult case, given all the bad stuff, it may be a moot question. It may be a moot question if, indeed, the jurors actually considered all the other exhibits. I'd have a difficult time, if I find against the government at that hearing, I'd have a difficult time in saying . . . I'd have to speculate as to whether, in effect, the defendants were prejudiced.

MR. MONTANA: The government—

THE COURT: I agree with the government, it doesn't require—and that's why I denied the mistrial—it doesn't

require a mistrial because it's not a per se or patent error because these are documents that have been received in evidence, the overwhelming majority of them.

But the argument that the defendants make is it is like a government's brief being in the jury room, and if, indeed, we can memorialize whether or not they used it as a government's brief, the Seventh Circuit won't have to speculate on that.

MR. LYNCH: That's the key, Judge. His Honor has hit the key to this thing: Did they use that particular document as a guide to their deliberations throughout the case.

THE COURT: Well, I have no problem with it being as a guide. My problem is: Did they use that document to the [6190] exclusion of all the other exhibits which they had before them including the defendants' exhibits.

MR. MONTANA: Judge, if they used it as a guide, it would be improper, too.

MR. LYNCH: Sure.

MR. MONTANA: Why couldn't we have our little handy-dandy guide in there with them, too.

THE COURT: I didn't say they used it as a guide.

MR. MONTANA: I'm saying if they did use it as a guide, even if it wasn't to be—

THE COURT: My concern is that they used it to the exclusion of the defendants' exhibits. They say, "Here's the evidence right here, and we won't look at anything else".

MR. DEADY: Well, Judge, then you're not just talking about exhibits. I mean, they would have to say that they used it to the exclusion of all the testimony—

THE COURT: —evidence, the testimony—

MR. DEADY: —and the other documents and evidence admitted in evidence, and charts, and whatever other demonstrative exhibits that were actually physically put in before them, I mean, published to them.

MR. MONTANA: That overstates things, Judge. The point is if they used it in their deliberations . . . I would say right now, frankly, since the record is replete that they used it and it was extraneous and it shouldn't have been [6191] back there, your Honor should be granting a mistrial. I mean, the government recitation of that case says that the prejudice is presumed. I think you could presume the prejudice right now.

MR. LYNCH: Particularly in light of the fact that the foreman of the jury the following day came into chambers because he thought it was so egregious and complained about it.

THE COURT: It was an important document for the jury, and they utilized it in their deliberations. If they utilized it to the exclusion of all the other evidence in the case and all the other exhibits, then, if indeed, I find that you indicated you were not going to send them over and you had agreed not to send them in to the jury room, then the court has got a tough decision.

I will conduct a voir dire hearing of the jurors one at a time in chambers with counsel present and the court reporter.

MR. MONTANA: Judge, just so the record is clear, it's our position that right now based upon the fact that they did use that document and it was an important document, then I think your Honor should grant a mistrial in any event because the error is clear regardless of your voir dire.

THE COURT: And that motion will be denied. That is the third time you've made that motion, Mr. Montana. [6192] MS. BOGART: Judge, can we—

MR. DEADY: Judge, can we get an indication from the court of what exactly the question is going to be?

THE COURT: I'm going to ask the jurors—when we get in chambers, we'll write it out—whether they used

that document to the exclusion of all the other evidence and exhibits in the jury room during their deliberations. Write it out, someone. Come in chambers when you're ready.

(At 4:30 p.m., following proceedings transpired in chambers:)

[6193] THE COURT: I'm going to ask these jurors one by one whether they used the so-called "jury book" to the exclusion of all the other testimony they heard in the case and the exhibits, all the other exhibits submitted in evidence.

MR. MONTANA: I know that is what your Honor said. We object to that question. The question in our view should be:

"Did you use the "jury book" in your deliberations?"

because I think the—

THE COURT: Period.

MR. MONTANA: That's the question.

MR. LYNCH: No, there would be a Question 2:

"To what degree?"

MR. MONTANA: To what extent.

MR. LYNCH: To what extent.

MR. MONTANA: And let them tell us.

MR. LYNCH: And let them tell us, Judge.

MR. MONTANA: I think the thing is from our perspective if they used those jury books at all, there is error, not did they use them—

THE COURT: I understand your position.

MR. MONTANA: Well, I just want to make it clear because I think the Seventh Circuit will want to know:

"Did the jury use these jury books in their deliberations?"

MR. LYNCH: It will give them something to really see.

[6194] THE COURT: What I want to know is whether the use of these jury books resulted in their verdict irrespective of what they heard and irrespective of the evidence. Maybe we can start off, maybe we can have a conference:

> "Did you examine any exhibits in this case during your deliberations other than the jury book?"

MR. MONTANA: Judge, I think—

THE COURT: You don't like that?

MS. BOGART: I don't think that's the question, Judge.

MR. MONTANA: I think the only question is:

> "Did you use the jury book in your deliberations?"

because if they did, Judge, as far as we are concerned, it's improper.

THE COURT: Then I'll ask the questions. I'll ask the questions.

* * * * *

MR. MONTANA: I just want the record to be clear, your [6195] Honor, that we don't agree with the court's question. We think the question is:

> "Did you use the jury books in your deliberations?"

THE COURT: Let the record show that neither the government nor the defense agree to the court's question. The court is conducting this voir dire to satisfy itself, if, indeed, these jury books went in there without agreement, or the government is guilty of some infraction in having those jury books in the jury room, what effect, if any, we find as a result of that. It may be a moot question after we hear from the government as to how they got in the jury room.

Okay?

MR. MONTANA: I doubt it.

[6196] * * * * *

(Juror Sandra M. Besenhofer escorted into chambers.)

THE COURT: Ms. Besenhofer, would you step in here please.

JUROR BESENHOFER: Why do I get to be first? (Laughter)

THE COURT: Have a seat in that chair. Take that "hot seat" right there.

JUROR BESENHOFER: Okay.

THE COURT: Ms. Besenhofer, you had the use of the jury book during your deliberations, the same jury book that you had on your laps throughout the entire course of the trial.

JUROR BESENHOFER: Uh-huh.

THE COURT: You made use of those jury books during your deliberations?

JUROR BESENHOFER: Yes.

THE COURT: Did you make use of those books in your deliberations to the exclusion of all the other exhibits that you had in the jury room with you?

[6197] JUROR BESENHOFER: With exclusion of all the others?

THE COURT: Yes, to the exclusion of all the other exhibits? Let me put it this way. Did you consider all of the other exhibits in the jury room in arriving at your verdict?

JUROR BESENHOFER: More so than the book, itself, yes.

THE COURT: Okay. Here's your certificate for fine service performed, and if you don't get paid, call me, and we'll get you a lawyer. (Laughter) Okay?

JUROR BESENHOFER: Thank you.

(Certificate of Jury Service presented to Juror Besenhofer.)

THE COURT: Thank you very much.

JUROR BESENHOFER: Thank you.

THE COURT: Would you send in please . . . you can't go back to the jury room. Okay? Ask him to send out Dolores Ticknor.

JUROR BESENHOFER: He wants Dolores Ticknor.

(Juror Dolores Ticknor escorted into chambers.)

THE COURT: Ms. Ticknor, would you have a seat over there?

JUROR TICKNOR: Right.

THE COURT: Ms. Ticknor, do you recall using the jury book throughout the entire course of the trial?

JUROR TICKNOR: Yes.

[6198] THE COURT: During your deliberations, did you use this jury book?

JUROR TICKNOR: Yes.

THE COURT: To the exclusion of the other exhibits—

JUROR TICKNOR: No.

THE COURT: —received in evidence?

JUROR TICKNOR: No.

THE COURT: Thank you.

JUROR TICKNOR: You're welcome.

THE COURT: And here's a certificate for you. You can put it on your wall. No big deal.

JUROR TICKNOR: Thank you.

(Certificate of Jury Service presented to Juror Ticknor.)

THE COURT: But I will tell you what . . . I've never seen a jury work as hard as you have, and we all appreciate it.

JUROR TICKNOR: Thank you.

THE COURT: And I agree—

JUROR TICKNOR: I wanted to ask, are we allowed to talk to the lawyers of the defendants?

THE COURT: No.

JUROR TICKNOR: No?

THE COURT: No.

JUROR TICKNOR: Or the defendants?

THE COURT: There is a prohibition under the Federal [6199] Rules of Criminal Procedure that lawyers are not allowed to talk to jurors.

JUROR TICKNOR: Okay.

THE COURT: You see, that causes problems later on if there's an appeal in the case.

JUROR TICKNOR: Oh, okay. Will we know . . . is there any way that we can find out what happens?

THE COURT: Yes, you can come to court on . . . well, you know what happened on the forfeiture. You can come to court on July 30, and 31. On July 30, we'll be sentencing Mr. Conarty. Is that correct? Is it Conarty on the 30th?

MR. SHALGOS: That's correct, on the 30th.

THE COURT: On the 30th; and on the 31st, the court will be sentencing Mr. Best and Mr. Bewick. That's my job. And if you don't want to come to court, I think you will see something in the newspapers. You can read the papers now. You can call us if you like. It's up to you. Okay?

JUROR TICKNOR: Okay. Thank you.

THE COURT: Would you ask the marshal to send in Victor Bodzanowski?

JUROR TICKNOR: Yes.

THE COURT: And you can't go back to the jury room. Okay?

JUROR TICKNOR: Okay, I won't.

MR. MONTANA: Judge, did you say it was the 31st for [6200] Bewick?

MR. SHALGOS: I thought it was the 30th.

MR. MONTANA: I thought it was the 30th.

MR. SHALGOS: Bewick and Conarty are on the 30th.

THE COURT: I don't think there are thirty-one days in July.

MR. LYNCH: The 31st is for us.

THE COURT: I've got the 31st for Bewick and Best.

MR. MONTANA: You told us the 30th.

MR. SHALGOS: And you have Conarty on the 30th.

THE COURT: Okay.

(Juror Victor P. Bodzanowski escorted into chambers.)

THE COURT: Mr. Bodzanowski, have a seat there, please. Mr. Bodzanowski, do you remember the jury book you used throughout the entire course of the trial?

JUROR BODZANOWSKI: Yes.

THE COURT: That you had with you back in the jury room?

JUROR BODZANOWSKI: The black one?

THE COURT: Yes.

JUROR BODZANOWSKI: Yes.

THE COURT: Did you make use of the jury book?

JUROR BODZANOWSKI: Yes, of course.

THE COURT: To the exclusion of all the other evidence in the case, the other exhibits with you in the jury room?

[6201] JUROR BODZANOWSKI: The book was always in front of me, yes.

THE COURT: Did you make any use of the other exhibits in the jury room?

JUROR BODZANOWSKI: Yes, we went through the files, and the charts, and everything.

THE COURT: And did you consider all of the other exhibits?

JUROR BODZANOWSKI: Yes.

THE COURT: Along with the jury book?

JUROR BODZANOWSKI: Right.

THE COURT: Thank you, Mr. Bodzanowski. Here's your certificate that you can hang on the wall. We are very appreciative of your fine work.

(Certificate of Jury Service presented to Juror Bodzanowski.)

JUROR BODZANOWSKI: Thank you.

THE COURT: Would you have the deputy bring in Virginia Beiersdorf.

JUROR BODZANOWSKI: Yes.

MR. MONTANA: Judge, how about letting us talk to the jurors? That would be fun . . . and very educational. What was her name again?

MR. LYNCH: Ticknor.

THE COURT: The trouble is there is a case that [6202] recently came down that says no.

MR. MONTANA: Well, we can't do it without your permission.

THE COURT: It is not within my province. The Seventh Circuit says, "Don't give permission because you give us problems later on".

(Juror Virginia Beiersdorf escorted into chambers.)

THE COURT: Ms. Beiersdorf?

JUROR BEIERSDORF: Yes.

THE COURT: Have a seat here, please. First of all, I want to thank you for the close attention you paid throughout the entire course of the trial, the hard work, and fine work.

Do you remember the jury book that you used during the course of the trial?

JUROR BEIERSDORF: Uh-huh.

THE COURT: You utilized that jury book in connection with your deliberations as a juror?

JUROR BEIERSDORF: Yes.

THE COURT: Did you do that to the exclusion of all the other exhibits?

JUROR BEIERSDORF: Oh, no, we were in and out of all those boxes, many more of those boxes than I suppose you'd even suspect. It was very interesting.

THE COURT: Thank you very much.

JUROR BEIERSDORF: You're welcome.

[6203] THE COURT: Let me give you a certificate.

(Certificate of Jury Service presented to Juror Beiersdorf.)

JUROR BEIERSDORF: Thank you.

THE COURT: And would you do me a favor?

JUROR BEIERSDORF: Yes.

THE COURT: Send in Mr. Porzio.

JUROR BEIERSDORF: Sure.

(Juror James P. Porzio escorted into chambers.)

THE COURT: Mr. Porzio, have a seat here.

JUROR PORZIO: Sure.

THE COURT: I think you know everybody here.

JUROR PORZIO: Right.

THE COURT: Mr. Porzio, you recall the jury book that the jury used during the entire course of the trial?

JUROR PORZIO: Yes, sir.

THE COURT: And I assume you used that same jury book during your deliberations?

JUROR PORZIO: Right.

THE COURT: Did you use that book to the exclusion of all the other exhibits?

JUROR PORZIO: No, no. The only time we used the book is when we wanted to get into the file, and that was one item that was in the file. So rather than pass the one item around, everybody looked at the book. But the other items [6204] that were in the file, we passed those all around.

THE COURT: In other words, you would go through the original documents in the file?

JUROR PORZIO: Right.

THE COURT: Thank you very much, Mr. Porzio. Here's a certificate for you. I don't know what you want to do with it.

(Certificate of Jury Service presented to Juror Porzio.)

JUROR PORZIO: Thank you very much.

THE COURT: Thank you for your very fine work.

JUROR PORZIO: Thank you.

THE COURT: Would you send in Ms. Cutrona.

JUROR PORZIO: Ms. Cutrona. Yes.

(Juror Patricia M. Cutrona escorted into chambers.)

THE COURT: Ms. Cutrona, step around this way, please. Have a seat.

Ms. Cutrona, do you recall using the jury book throughout the course of the trial?

JUROR CUTRONA: Yes.

THE COURT: And you, obviously, used it during your deliberations as well?

JUROR CUTRONA: Yes.

THE COURT: Did you use that book to the exclusion of all the other evidence in the case?

[6205] JUROR CUTRONA: No, sir.

THE COURT: Did you use other exhibits in the jury room during the deliberations?

JUROR CUTRONA: Yes, we went through the loan files, each one, separately that were there, the loan files.

THE COURT: You went through each loan file?

JUROR CUTRONA: A lot of them. I think all of them.

THE COURT: Thank you very much.

JUROR CUTRONA: Okay.

THE COURT: Let me give you a certificate—

JUROR CUTRONA: Thank you.

THE COURT: —with the thanks of your government.

(Certificate of Jury Service presented to Juror Cutrona.)

THE COURT: Would you do me a favor and send in or ask the deputy to send in Ms. Bergman.

JUROR CUTRONA: Okay.

(Juror Gladys M. Bergman escorted into chambers.)

THE COURT: Ms. Bergman, do you want to step around this way and have a seat.

Ms. Bergman, do you recall using the jury book during the course of the trial?

JUROR BERGMAN: Yes.

THE COURT: And do you recall the jury book being in the jury room with you during your deliberations?

[6206] JUROR BERGMAN: That's correct.

THE COURT: Did you use that jury book to the exclusion of all the other exhibits and evidence you heard in the case?

JUROR BERGMAN: No. Would you like me to elaborate on that?

THE COURT: Sure.

JUROR BERGMAN: We used the charts, we used the files. I'd say we used everything. We didn't go into everything, you know, every piece.

THE COURT: Well, that shows good sense on your part. Ms. Bergman, let me give you a certificate from your government for your fine service. Thank you very much.

JUROR BERGMAN: Thank you.

(Certificate of Jury Service presented to Juror Bergman.)

THE COURT: Would you ask the deputy to send in the foreperson, Mr. Barker?

JUROR BERGMAN: I will.

MR. MONTANA: It is interesting to note that nobody said anything about looking at defense exhibits.

THE COURT: Do you want me to ask them? I will ask them that. Do you want me to ask the next one that? No?

MR. MONTANA: Judge, as far as I'm concerned, the fact that they used it during their deliberations is the end of the inquiry. That's our position.

[6207] THE COURT: I understand. Do you want me to ask them if they looked at the defense exhibits?

MR. MONTANA: No.

THE COURT: Okay.

(Foreperson William H. Barker escorted into chambers.)

THE COURT: Mr. Barker, will you have a seat here? We'll only keep you a second.

FOREPERSON BARKER: Yes.

THE COURT: Mr. Foreperson, do you recall the jury book that the jury utilized during the course of the trial?

FOREPERSON BARKER: Yes.

THE COURT: And, of course, you had those jury books with you in the jury room. I think you're the first one who complained about their being missing. I think we owe you an explanation, and I should have explained to the other jurors, too. But, at any rate, did you use the jury book during your deliberations?

FOREPERSON BARKER: Only incidentally. It was what we had inserted into the jury book to keep it out of prying eyes. You understand, there were engineers in there fixing the blinds and things and so we pushed things into the jury book and slammed it shut.

THE COURT: The notes which were the subject matter of your two notes, which we haven't responded to to this day, is that correct?

[6208] FOREPERSON BARKER: That is correct.

THE COURT: Did you utilize all the exhibits in the jury room including the jury book in order to arrive at your decision?

FOREPERSON BARKER: No. Actually, after you withdrew the books, we went back to the original exhibits and we for all practical purposes started all over again, but most of us had . . . there was no need for great deliberation. If there was, then we went to the exhibits, themselves.

THE COURT: Mr. Barker, the reason we did not—and I thank you for your thoughts—the reason you didn't get

those notes back, and I know they were important notes concerning your deliberations presumably, is because we sealed all those books, and we sealed all the notes. And there is some question arising as to the propriety of those jury books being in the jury room. So we are going to make them available to the Seventh Circuit in the event there is an appeal in this case. Okay?

Thank you very much, Mr. Barker. I have a certificate for you, and on behalf of all the parties and the court, we thank you for your diligent work, hard work, above the call of duty. It was a long trial, a tough trial, and I can't quarrel with your decision.

FOREPERSON BARKER: It was the hardest thing I've ever done. It really was.

[6209] THE COURT: I can believe that. And that was quite obvious after the supplementary verdict. I don't recall the last time I saw jurors cry. You know there were some jurors crying when they came back. So you were a great jury.

FOREPERSON BARKER: Well, thank you very much.

(Certificate of Jury Service presented to Foreperson Barker.)

THE COURT: Good Luck. Would you ask the deputy to send in Ms. Dodaro?

FOREPERSON BARKER: Dorado? Okay.

THE COURT: Thank you, sir.

(Juror Nancy Dodaro escorted into chambers.)

THE COURT: Ms. Dodaro, would you have a seat there please.

JUROR DODARO: Yes.

THE COURT: Ms. Dodaro, do you recall the jury using the jury books during the course of the trial?

JUROR DODARO: Yes.

THE COURT: And you, obviously, used those books during your deliberations as well?

JUROR DODARO: Uh-huh.

THE COURT: Did you use those books, the jury books, to the exclusion of all the other evidence in the case?

JUROR DODARO: No, in combination of everything, not just the book, by itself.

[6210] THE COURT: That's all we want to know.

JUROR DODARO: Okay.

THE COURT: If you answered any differently, we wouldn't give you the certificate.

JUROR DODARO: Okay.

THE COURT: And since you gave the right answer, you've won a certificate.

JUROR DODARO: Okay.

(Certificate of Jury Service presented to Juror Dodaro.)

THE COURT: Thank you very much for your fine work.

JUROR DODARO: Okay. Bye-bye.

THE COURT: Bye-bye. Oh, would you have the deputy send in Mr. Kapralis?

JUROR DODARO: Kapralis? Okay.

(Juror Daniel Kapralis escorted into chambers.)

THE COURT: Mr. Kapralis, will you step around this way, please? Have a seat. I won't ask you to raise your right hand to be sworn. (Laughter)

Mr. Kapralis, do you recall the use of the jury book during the course of the trial?

JUROR KAPRALIS: Yes.

THE COURT: The same jury book which you had available to you in the jury room during your deliberations.

JUROR KAPRALIS: Yes.

[6211] THE COURT: Did you use that jury book to—

JUROR KAPRALIS: Yes.

THE COURT: Obviously, you used it.

JUROR KAPRALIS: Yes, we used it.

THE COURT: Did you use it exclusively in coming to a decision?

JUROR KAPRALIS: Well, we referred back and forth. The charts . . . we put the charts up.

THE COURT: You utilized all of the exhibits in the jury room—

JUROR KAPRALIS: Yes.

THE COURT: —including the jury book?

JUROR KAPRALIS: Yes.

THE COURT: Thank you, sir. Mr. Kapralis, here is a certificate for you for the fine work you've done.

JUROR KAPRALIS: Thank you.

(Certificate of Jury Service presented to Juror Kapralis.)

THE COURT: We look forward to seeing you again, maybe under some other circumstances.

JUROR KAPRALIS: Okay, thank you. Bye-bye.

THE COURT: Would you ask the deputy to send in Mr. Seufert.

JUROR KAPRALIS: Mr. Seufert. All right, Judge.

THE COURT: Thank you.

[6212] JUROR KAPRALIS: Thank you.

(Juror George E. Seufert escorted into chambers.)

THE COURT: Mr. Seufert, have a seat here please.

Mr. Seufert, do you recall the jury using the so-called "jury book" during the course of the trial?

JUROR SEUFERT: Yes, we have.

THE COURT: The same jury book that you had with you in the jury room?

JUROR SEUFERT: Yes.

THE COURT: Did you use that jury book exclusively in deciding this case, or did you use the other exhibits in the jury room to come to your decision?

JUROR SEUFERT: We used the books and quite a few of the exhibits, and went over the checks and quite a few

of the documents in there with the different forms on them.

THE COURT: Okay, sir. Thank you, Mr. Seufert. Here's your certificate. And I wish to thank you on behalf of the parties, the lawyers and the court for the fine work you've done. Okay?

JUROR SEUFERT: Thank you.

(Certificate of Jury Service presented to Juror Seufert.)

THE COURT: Look forward to seeing you again one day.

JUROR SEUFERT: I hope not. (Laughter)

THE COURT: Would you ask the deputy to send in . . . what [6213] did he say?

THE COURT REPORTER: "I hope not". (Laughter)

THE COURT: Why not?

JUROR SEUFERT: I've been here about four times.

THE COURT: Isn't this a nice experience? Wouldn't you like to spend another couple of months here?

JUROR SEUFERT: No, sir, I would not.

THE COURT: No? You really wouldn't?

JUROR SEUFERT: No.

THE COURT: Would you send in Ms. Romund, please? Do you know I have to do this every day?

JUROR SEUFERT: I imagine. That's your job.

THE COURT: Will you write your Congressman? Have him send in Ms. Romund. Thank you very much.

(Juror Pamela L. Romund escorted into chambers.)

THE COURT: Pamela—

JUROR ROMUND: Yes.

THE COURT: —have a seat there.

JUROR ROMUND: Yes.

THE COURT: Do you remember using the jury book during the course of this trial?

JUROR ROMUND: Yes.

THE COURT: And you used it in connection with your deliberations as well, I take it?

JUROR ROMUND: Yes.

THE COURT: Did you use that jury book to the exclusion [6214] of all the other exhibits in evidence in this case?

JUROR ROMUND: No, no. Normally, we would go and get the actual file from whatever loan was in question. One person would go through the file, and just grab whatever piece of evidence we were trying to look for. The other members of the jury would then look in the jury book if it was listed in the jury book. And that was it.

THE COURT: Okay. Thank you very much. Well, that's the way a bright juror—

JUROR ROMUND: Oh!

THE COURT: —would approach his or her job. Thank you very much. We have a certificate for you for your fine work.

JUROR ROMUND: Thank you.

(Certificate of Jury Service presented to Juror Romund.)

THE COURT: And perhaps one day our paths will cross again. If you want to volunteer for jury duty again, send me your name.

JUROR ROMUND: Okay.

THE COURT: We'll try to pick a shorter trial next time . . . about six weeks. (Laughter)

JUROR ROMUND: That would be nice.

THE COURT: Thank you very much.

JUROR ROMUND: Thank you.

[6215] * * * * *

MR. MONTANA: We are still going to make our motion for a mistrial. I don't think there is any question that this jury used those books. Those books shouldn't have been back there. I think it's apparent from what they said

they used them at least as a guide. They used them, period. They should not have been back there. They shouldn't have been used. So I think that—

THE COURT: All part of your post-trial motions.

MR. MONTANA: Pardon me?

THE COURT: You want a hearing? I don't see any point to a hearing in light of the voir dire.

MR. MONTANA: Well, we are going to ask for a hearing with respect to how these jury books got back there because it's our theory that just on the basis of them using the jury books, it's improper, and those books should not have been sent back there.

[6216] THE COURT: Well, let's assume for purposes of argument the government concedes, "Well, yeah, they shouldn't have gone back there", okay, you already know my position that it is not plain error, it is not error at all by virtue of the fact that every exhibit in that jury book was received in evidence. . . .

* * * * *

THE COURT: Let's assume all of this. This jury, having had these jury books in their laps for seven weeks, as I indicated when you first raised the question, I think the very first question they would ask if they didn't have the jury books is, "Where are the jury books? Bring them in."

MR. LYNCH: Here's the problem.

THE COURT: Where is the prejudice?

MR. MONTANA: Judge—

[6271] THE COURT: Where is the prejudice? That is the point?

MR. LYNCH: Here it is, Judge. The jury books are a guide to the presentation of the government's case. What they did and what is corroborated by these people is they utilized that book to call upon the other records that were

in the jury room, none of which were defendants' exhibits . . . none. And I respectfully submit what we have is a road map leading to conviction by utilizing that kind of deliberation because it causes focus on the government's theory to the exclusion of the defendants', and I think that is what we heard here.

MR. MONTANA: I think that's right, Judge. So our feeling is that it is extraneous material that went back to the jury, it was improper, and as far as we are concerned, we're still entitled to a hearing.

THE COURT: Does the government want to go through with an evidentiary hearing?

MR. DEADY: Your Honor, we think the matter should be presented by way of written motion with memoranda. We don't think, based on our review of the case law, an evidentiary hearing is mandated under these circumstances, and we think the case law supports us on that point.

THE COURT: Okay, we expanded the time for filing post-trial motions.

[6218] * * * * *

THE COURT: Okay; and then I'll make a determination as to whether we need a hearing after I see both the defendants' and the government's briefs. Okay?

July 7, 1987

[6241] * * * * *

MR. MONTANA: Your Honor needs to schedule an evidentiary hearing with respect to the motion on the jury books and the prosecutorial misconduct.

THE COURT: Do we need an evidentiary hearing?

MR. MONTANA: Pardon me, Judge?

THE COURT: You say we need an evidentiary hearing?

MR. MONTANA: Judge, it is our position—and I think our position was stated in our original motion—that if

there are any issues, factual issues, that the government contests that we posit in our motion, then the court should hold an evidentiary hearing. We haven't seen their response so we don't know what their position is going to be.

MS. BOGART: I can tell you the government's position, Judge. If there are any factual disputes that exist, it isn't going to be necessary, in our opinion, to hold a hearing to resolve those factual disputes.

THE COURT: Let me see if, indeed, the court agrees with you that we need an evidentiary hearing. I will have Frances call you [6242] and maybe arrange a date.

MR. MONTANA: When we file our reply, Judge, we will let the court know our position as to whether we think an evidentiary hearing is necessary.

THE COURT: Sure.

MR. MONTANA: I would say we think that an evidentiary hearing is necessary. It is our position right now for the record that an evidentiary hearing is necessary.

THE COURT: Okay.

August 27, 1987

[6251] * * * * *

THE COURT: . . . How long will this hearing take?

MR. MONTANA: Well, your Honor, because the attorneys will be witnesses, the defendants have Tom Sullivan who will conduct the hearing on behalf of the defendants. The lawyers are going to testify. Each of the lawyers is going to testify.

THE COURT: Perhaps I should ask Mr. Sullivan that question. We are always happy to have Mr. Sullivan in our courtroom. How long do you expect the hearing to take, Mr. Sullivan?

MR. SULLIVAN: I would say two hours.

THE COURT: Okay.

MR. HOGAN: Your Honor, it is the government's position that we don't need to take any testimony whatsoever, that as a preliminary matter, the court needs to find that there is some substantial prejudice to the defendants by the introduction of the jury books [6252] into the jury room. . . . Our position, as I briefly stated before, is that we don't need to have a hearing. Our position was fully articulated in our brief in response to the defendants' motion.

[6254] * * * * *

MR. HOGAN: Your Honor, our position as set forth in our response to the defendants' motion is basically that a hearing is unnecessary because the grounds on which they have requested their hearing are inaccurate.

First of all, the primary basis that they requested the hearing was because they claim that there were several documents in the jury book which were not in evidence. That is incorrect. As we have demonstrated in the reply brief or in our response brief, all of the documents in the jury book were, in fact, in evidence. . . .

[6256] * * * * *

MR. LYNCH: May I respond to that, Judge? If the court please, counsel misses the thrust of the defendants' position in relation to the prejudice.

We have a situation where the government sent to the jury room somewhere between twelve and sixteen—the exact number of the jury books we don't know—jury books, after telling us they wouldn't go back. And here is the problem: We have a situation where the jury books highlight one aspect of the case, and that is the aspect that is detrimental to the defendants, the receipt of funds. By elimination of documents from the book, they do not put in the explanatory documents that soften the blow or explain why the money to the defendants.

We respectfully submit, then, that that book being put in the jury room without our knowledge—and we would have objected very strenuously—that book was highly prejudicial in that by leaving out, say, the contracts in relation to the land propositions, leaving out those statements of fact which totally debunk some of the government's testimony, namely, the testimony of—and I just bring this up for illustration—Pearah, in relation to his million dollars needed in Iowa, which was never a particular part of the agreement, and also Ryan and Henning in relation to their agreement—if the [6257] court will recall, that contract was not included—and the contract, itself, Henning said, "I don't know if I saw it. Someone stuck it in front of me", and Ryan said, "Someone just stuck it in front of me"—and here we have evidence which shows that the document was, in fact, typed up on Henning's typewriter. The loan commitments were excluded. Again, they explain where the money was to go and the amounts of the money in question, thereby debunking, again, Pearah, in relation to that million dollar item which was very important in the case. The explanatory documents in relation to the moneys received by my client, or, let's say, yes, the moneys received by my client from Mr. Henning which related to, first of all, the notes that were signed by Henning when my client in Henning's time of need gave him money because his wife's car was going to be repossessed, because his children didn't have money for school in relation to their tuition, because the family needed money for presents at Christmas time, $4,500. That was always characterized by the government as being a "kickback" when in truth and in fact there were documents which supported this, and as a matter of fact Henning said that is exactly why the moneys were given to him in the first place and the notes were his.

I respectfully submit they admitted to putting in the explanation for the $30,000 that my client received from Mr. Henning which was the contract in relation to the sale of the Wayne property as well as the appraisals.

And last of all, in relation to the explanation of moneys [6258] that Henning received or paid out, the $26,000 payment which the U.S. Attorney indicated was a payment made to Mr. Henning for express payment to Mr. Pojman, when in truth and in fact we proved at the time of trial with the documents of the bank that the $26,000 didn't go to Mr. Pojman, but went to pay Mr. Henning's obligation to the bank back.

We go on in relation to a number of such items not the least of which we come to the general impact documents which the court will remember went into evidence. Those would be the board of directors' work papers as they related to loans. Those particular documents would have explained each of the loans in question and put them in perspective in that the board of directors considered each of the loans in question, approved them, and we also have an idea as to the depth of the transactions in question.

We had five loans in the indictment. There were some similar occurrences, but, basically, five loans in the indictment. During the 18-month period that is tracked in the indictment, some 400 commercial loans were made at the bank, totaling $250 million. And I respectfully submit the five loans in question were a pittance in relation to that.

So what we have here is a roadmap by these documents, a roadmap to conviction that the prosecutor was able to get before the jury without our having an opportunity to argue our position. It is like taking the testimony, critical testimony, of witnesses for the prosecution and amplifying it a dozen times and sending it back to [6259] the jury. . . .

[6261] * * * * *

I respectfully submit, Judge, that we have in this instance a situation where the prosecution sent those documents back after telling us they would not go back. Had we had the information in advance that they would have gone back, we would have argued strenuously to this court. And I am certain that this court would never have allowed an amplification of one facet of the case [6262] prejudicial to the defendants to be sent to the jury.

Thank you. That is our position.

MR. HOGAN: Your Honor, may I respond to that briefly, or does the court wish to hear from other defense counsel?

MR. MONTANA: Your Honor, I am not going to repeat everything that Mr. Lynch said. But if you take a look at this jury book . . . first of all, let's keep some basics in mind. This jury book was not marked as an exhibit, never marked as an exhibit . . . never. If you take a look at the jury book and you compare it to their indictment, you will see what the jury book does is sort of track the allegations of the indictment. There is a document in the jury book to fit just about every allegation of the indictment. And the jury book, of course, has convenient tabs on it for the jurors to refer to it.

> "Let's see, the indictment talks about the Rau Farm/Naperville transaction. Let's get our jury book and go to those transactions in the jury book and follow along."

So what we have here is a selective compilation of documents favorable to the government.

Secondly, your Honor, if you were to compare these jury books to the charts of the government—if you remember, the government put in certain summary charts, summary charts which show the flow of money and show how certain defendants received certain of the

loan proceeds—these jury books track that exactly. So there is no question that these jury books in any common sense term had a [6263] prejudicial impact upon the jury.

And we know that the jury utilized the jury books because they said they utilized the jury books. Every one of them said they utilized the jury books. They used them as a guide.

So I don't think there is any question that there is prejudice. I would say all we need to show is a possibility of prejudice. I would say the likelihood of prejudice was overwhelming. So I think that the prejudice issue, if that is what we are addressing here at the moment, the prejudice issue should be resolved in our favor because there is clearly prejudice.

THE COURT: Thank you. Mr. Shalgos.

MR. SHALGOS: Your Honor, again, I am not going to reiterate Mr. Lynch's argument or Mr. Montana's. I would only state that Mr. Conarty relies upon the cases cited by Mr. Lynch. That's *United States v. Ware*, a Seventh Circuit case, and *United States v. Brown*. And we suggest, your Honor, that there is language in those cases that is very, very analogous to the situation that confronts this court today. And the court talks about there being a presumption of prejudice when the situation occurs, as it has here. So I would rely on that, your Honor, respectfully.

THE COURT: Thank you. Mr. Hogan.

MR. HOGAN: Yes, your Honor.

First of all, I think what Mr. Lynch said about the *Remmer* case is demonstrative of his approach to this entire issue. He conveniently stopped his reading of that quote that he was [6264] reading at the portion that begins after the "presumptively prejudicial" language, he left out the balance of the paragraph that reads:

> "The presumption is not conclusive, but the burden rests heavily upon the government to establish after notice and hearing of the defendant that such contact with the juror was harmless to the defendant."

Moreover, in the *Remmer* case, the court did not reverse the conviction. What they did was remand it for a hearing on the impact of the communication to the juror, whether or not it was prejudicial at all, and, in fact, upon that remand, the hearing was held and it was determined not to be, which is not particularly germane to this case.

In this case, all of the documents in the jury book were in evidence. It is not a roadmap to conviction. What those documents are are strictly neutral documents that were compiled from the various loan files. They were as much of a roadmap to acquittal as they were to conviction.

The theory of both parties in this case was that those transactions were designed to be normal appearing. The defendants' position was that they were, in fact, normal. The government's position was that they were a sham, that they were created to have that appearance of normality.

All the documents in the jury book did was copy documents that were already in evidence, already in the loan files, and they were, in fact, very straightforward normal neutral appearing [6265] documents. They were at best intrinsic documents that had been admitted during the course of the trial. There was nothing extrinsic that was brought into the jury room in any fashion.

So once the court determines that those were, in fact, intrinsic documents, I suggest that the inquiry is over. The court doesn't even need to reach the prejudice analysis until it finds that there was something extrinsic brought into the jury room. And, in fact, in those circumstances, it is at that point that the court needs to determine whether or not there was prejudice. And the standard

is not one of likelihood of prejudice or some capability of prejudice. The standard was and is, in fact, a substantial amount of prejudice. . . .

[6266] * * * * *

Mr. Lynch has argued that exculpatory evidence was not submitted in the jury book. Well, among the documents that were not contained in the jury book were the false appraisals that were created at Defendant Best's behest. So, you know, the jury book was utilized by both parties throughout the entire course of the trial. [6267] There was no particular "slant" on it at all.

As Mr. Lynch stated, this was just one facet of the case. Those were his words to your Honor about ten minutes ago. This was not a compilation of all the evidence by any stretch of the imagination. And, therefore, it is not the *Ware* case, or the *Adams* case, or any of the other cases that the defendants rely on.

Mr. Montana says, "Its a selective compilation". Well, it was a selective compilation that every juror had on his or her lap for seven weeks throughout the course of this trial.

The jurors did, in fact, during the course of their individual examination by this court, indicate that they had utilized the jury books during the course of their deliberations. But what they said was they utilized them as an aid. When they wanted a particular document from a particular loan file, what they did was look to see if that document was contained in the jury book. They then opened the jury book to that page, and for ease of their deliberations in order to help them basically conscientiously perform their duties as jurors, they all turned to that particular page in the jury book and referred to that document as opposed to passing a particular document around the jury room. Basically, what it did, I suggest, is eliminate

confusion and waste of time by the jury. I suggest it was a very conscientious jury. They were out for more than four days without a single question. There was no particular likelihood that they relied solely on the jury book. In fact, each of them testified that that was not the case in this case.

[6268] * * * * *

Now, we suggest that this court does not even need to get into resolving the issues of credibility that the defendants have created by their various affidavits. I suggest that it is a very unfortunate occurrence that they used some of the rhetoric that they have. The ad hominem attacks against Ms. Bogart I think are very unfortunate. We do not intend to engage in any kind of a debate by calling Ms. Feibus, or Mr. Montana, or any of the other defense counsel liars as they have Ms. Bogart. I suggest that that is not a very appropriate use of this court's time. And I think [6269] that THAT is about the only thing that a hearing in this case, an evidentiary hearing in which these defense counsel would testify, would add to the proceedings. And on that basis, your Honor, I suggest that this court deny their request for a hearing, and rule that the issue is moot, and all the documents were in evidence, and deny their motion.

[6272] * * * * *

THE COURT: Okay, there is no need for the government to respond. I quite agree with the government. There is no need for any additional hearing. I think it is mooted out.

The only concern this court had was the jury might have had with them during their deliberations exhibits which were not admitted in evidence. And I have no problem with it at all.

[6275] * * * * *

For all the reasons I denied the motion for a mistrial [6276] when you argued this originally, the court will deny the motion for a new trial or for the dismissal of the indictment. And, again, I quite agree there is no need for a hearing.

MR. HOGAN: Thank you, your Honor.

MR. LYNCH: And just let the record show that we are asking for a hearing. The Defendant Best asks for a hearing at this time.

THE COURT: By all means. The record may so indicate.

MR. MONTANA: All defendants ask for that hearing, and you are denying it.

THE COURT: The record may so disclose, sure.

(2) (3)

Nos. 91-746 and 91-748

Supreme Court, U.S.
FILED
JAN 30 1992
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In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN C. BEST and GREGORY J. BEWICK, PETITIONERS

v.

UNITED STATES OF AMERICA

PAUL F. CONARTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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QUESTIONS PRESENTED

1. Whether petitioners' rights were violated by the jury's consideration during its deliberations of binders containing a selection of government exhibits.

2. Whether the district court conducted adequate voir dire on the extent of the jurors' reliance on the binders of government exhibits.

3. Whether the court of appeals applied the correct standard of review in determining that the presence of the government exhibit binders in the jury room did not require reversal of petitioners' convictions.

4. Whether the district court was required to obtain sworn statements from the prosecutor and the case agent before ruling on the motion for a new trial based on the presence of the exhibit binders in the jury room during deliberations.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Arizona v. *Fulminante*, 111 S. Ct. 1246 (1991)	9
Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988)	9, 11
Sanchez v. *United States*, 293 F.2d 260 (8th Cir. 1961)	10
Smith v. *Phillips*, 455 U.S. 209 (1982)	9
United States v. *Adams*, 385 F.2d 548 (2d Cir. 1967)	10
United States v. *Brown*, 451 F.2d 1231 (5th Cir. 1971)	10
United States v. *Bruscino*, 687 F.2d 938 (7th Cir. 1982), cert. denied, 459 U.S. 1211 (1983)	6, 10, 13
United States v. *Hasting*, 461 U.S. 499 (1983)	9
United States v. *Jonnet*, 762 F.2d 16 (3d Cir. 1985)	14
United States v. *Littlefield*, 752 F.2d 1429 (9th Cir. 1985)	14
United States v. *Pendas-Martinez*, 845 F.2d 938 (11th Cir. 1988)	10
United States v. *Tebha*, 770 F.2d 1454 (9th Cir. 1985)	14
United States v. *Ware*, 247 F.2d 698 (7th Cir. 1957)	10

Statutes and rule:

18 U.S.C. 371	2
18 U.S.C. 657	2

Statutes and rule—Continued: Page

18 U.S.C. 1001 2
18 U.S.C. 1006 2
18 U.S.C. 1341 2
18 U.S.C. 1962(c) 2
Fed. R. Crim. P. 52(a) 9

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-746

JOHN C. BEST and GREGORY J. BEWICK, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 91-748

PAUL F. CONARTY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-22) is reported at 939 F.2d 425. The panel opinion of the court of appeals (Pet. App. 25-36), vacated on rehearing (Pet. App. 45), is reported at 913 F.2d 1179.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1991. The petitions for a writ of certiorari were filed on November 4, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners John C. Best and Gregory J. Bewick were convicted of conspiracy, in violation of 18 U.S.C. 371; 14 counts of mail fraud, in violation of 18 U.S.C. 1341; eight counts of misapplication of savings and loan funds, in violation of 18 U.S.C. 657; six counts of making false statements to the Federal Home Loan Bank Board, in violation of 18 U.S.C. 1001; participation by a bank officer in a loan transaction, in violation of 18 U.S.C. 1006; and participating in the affairs of an enterprise through a pattern of racketeering, in violation of the RICO statute, 18 U.S.C. 1962(c). Best was also convicted on an additional count of participation by a bank officer in a loan transaction. Petitioner Paul F. Conarty was convicted of mail fraud; three counts of misapplication of funds; and two counts of making false statements. Gov't C.A. Br. 3-4.

Best was sentenced to a year and a day in prison, three years' probation, and 500 hours of community service. Bewick was sentenced to six months' work release, three years' probation, and 500 hours of community service. Conarty was sentenced to three years' probation and 400 hours of community service. Pet. App. 4. A panel of the court of appeals initially reversed petitioners' convictions. *Id.* at 25-37. On rehearing, the en banc court vacated that decision, *id.*

at 45, and affirmed petitioners' convictions. *Id.* at 1-24.

1. In 1981, the American Heritage Savings and Loan Association (American) was experiencing severe financial difficulties. Best was American's president and chaired its Board of Directors. Bewick was American's executive vice-president and managing officer. Conarty later joined American as its in-house counsel. From 1981 to mid-1983, Best, Bewick, and Conarty engaged in improper transactions in an effort to keep American from failing. Pet. App. 2. Those transactions enabled American to continue its operations one year past the point of insolvency and delayed the takeover of American by federal bank regulators. *Id.* at 4.

American and its subsidiaries owned a large amount of real estate as a result of loan foreclosures. The real estate, known as "real estate owned" or "REO," was undesirable because it was a non-earning asset for American. In order to remove some of the REO from American's books, Best and Bewick arranged to have borrowers acquire the REO. For the down payments on those purchases, the borrowers used as much as was needed of the proceeds of loans from American. That scheme resulted in the sale of REO to borrowers who put no cash down and were typically known by Best and Bewick not to be creditworthy. Best and Bewick also inflated the purchase prices of the REO in order to allow American to record a profit on the sales. Despite the dangerous and improper character of those transactions, which lost money for the bank, Best and Bewick paid themselves large bonuses with funds from a bank subsidiary. Pet. App. 2-3.

In early 1983, Conarty became American's in-house counsel. In that capacity, Conarty participated

in a transaction in which American loaned funds to a partnership, two of whose partners were ineligible to borrow additional funds from the bank. Conarty also knew that one of the partners was involved in bankruptcy proceedings. Although the loan was ostensibly made to purchase real estate owned by American, two of the partners used the loan proceeds to pay off pre-existing, unrelated debts. Conarty was aware of that misuse of bank funds. Pet. App. 3.

2. On April 20, 1987, petitioners' seven-week jury trial commenced. Soon after the trial began, the government provided each juror with a loose-leaf notebook that contained key government exhibits, grouped by transaction. The binders were to be used to help the jurors understand the exhibits as they were described during trial. The trial judge instructed the jurors not to look in the binders until a particular exhibit was admitted into evidence; jurors were then instructed to look at the particular exhibit. The binders were used by the jurors throughout the trial, without objection by petitioners. By the end of the trial, each document in the binders had been admitted into evidence. Pet. App. 4-5, 9-10.

At the conclusion of the trial, the jurors left the binders in the jury box. On June 9, 1987, the prosecutor and defense counsel met to review the nine boxes of government exhibits and the one box of defense exhibits to determine what documents should be sent into the jury room. The boxes were lined up on the spectator bench in the courtroom. According to petitioners' counsel, the prosecutor promised that the binders would not be sent to the jury room. According to the prosecutor, no such promise was made. After the trial judge resolved some minor disputes over the exhibits, defense counsel left the courtroom.

The prosecutor and the FBI case agent then loaded the exhibits, including the binders, onto a cart, which the marshal took into the jury room. Pet. App. 5.

After four days of deliberations, counsel for one of the defendants learned that the binders were in the jury room and moved for a mistrial. The defense asserted that the binders, by emphasizing the government's exhibits, served as roadmaps for conviction. The defense also claimed that the defendants neither knew of nor consented to the jury's use of the binders during deliberations. Pet. App. 5-6, 87-89. With the agreement of the government, the trial judge had the binders removed from the jury room that evening. On the next day of deliberations, the jury returned its verdict. Thereafter, the trial judge individually examined each juror to determine whether any juror had used the binders of exhibits to the exclusion of the original exhibits. Each juror indicated that the binders were used only in connection with the use of the original exhibits. The jurors also indicated that they had examined the original exhibits. *Id.* at 6-7, 134-147. The court denied the motion for a mistrial. *Id.* at 102, 121, 131.

Before sentencing, petitioners moved for a new trial. They contended that the government had engaged in misconduct by misleading the defense about the evidence that would be sent to the jury. Petitioners also argued that the binders had prejudicially influenced the jurors in their deliberations. The district court denied that motion. The court noted that all the exhibits in the binders had been admitted into evidence during the trial; accordingly, there was no concern that jurors had obtained access to materials that were not properly before them. In light of that finding, the court concluded that a hearing on the allega-

tion of government misconduct was not necessary.[1] Pet. App. 7-8, 158.

3. A panel of the court of appeals reversed. Pet. App. 25-36. The panel stated that "in all likelihood the prosecutor dispatched the binders to the jury knowing that they were not supposed to go there." *Id.* at 32. The panel then determined that such conduct would warrant a new trial "if there was a 'reasonable possibility' that the presence of the unauthorized materials affected the jury's verdict." *Ibid.*, quoting *United States* v. *Bruscino*, 687 F.2d 938, 940 (7th Cir. 1982) (en banc), cert. denied, 459 U.S. 1211 (1983). In the court's view, such a possibility existed. Pet. App. 36.

The panel rejected the government's contention that the binders could not have affected the verdict since the documents were in evidence and the binders had been available to the jurors throughout the trial. The panel found that, unlike the boxed exhibits, the binders presented the evidence in a way that was favorable to the government's theory of the case. Pet. App. 32-33. The submission of the binders to the deliberating jury therefore amounted, the panel believed, to a "subtle" form of "jury tampering," *id.* at 35, that warranted reversal.

4. The en banc court vacated the panel decision and affirmed petitioners' convictions. The court noted that the threshold issue was whether the district court "acted reasonably in refusing to set aside the verdict because it found no possible prejudice." Pet. App. 8. Review of the district court's determination, the court noted, was guided by the abuse-of-discretion stand-

[1] The court explained that it was not finding that "the government intentionally actually deposited those jury books in there in order to prejudice the defendants." Pet. App. 129.

ard. In light of the record, the en banc court concluded that the district court had not erred. The court explained:

> [A]ll parties agree that the jury properly could review the exhibits contained in the binders—after all, they openly had been examining those binders, document by document, in the course of the seven-week trial, and by the end of the trial, every document in the binder had been admitted in evidence. Thus, it simply could not have been error for the jury to see the exhibits contained in the binders.

Id. at 9-10.

The court rejected the contention that the binders prejudiced the jury during deliberations because they made it easier for the jurors to follow the government's case, and because the jurors might have viewed the absence of any defense binders as a statement that the defense agreed that the government's binders contained all the relevant evidence. That claim, the court found, ignored the fact that the binders contained only copies of documents admitted in evidence, and that the original exhibits, both the government's and the defendants', were readily available to the jury. The binders were no more "roadmaps to conviction," the court noted, than were the ten boxes of carefully ordered government exhibits. Pet. App. 10.

The en banc court also emphasized that the district court had confirmed, through voir dire of each juror, that the jurors considered all the evidence, not just the binders, in arriving at their verdicts. The trial court's inquiry strengthened the court's belief that "the district court's denial of the defendants' motion for a mistrial was not an abuse of discretion." Pet. App. 12. Because the district court had not erred in finding an absence of prejudice in the jury's consid-

eration of the binders, the en banc court found it unnecessary to review petitioners' claims of prosecutorial misconduct. *Id.* at 13. The court further concluded that the district court had not abused its discretion in declining to hold an evidentiary hearing on petitioners' contention that the prosecutor had improperly sent the binders to the jury room.[2]

ARGUMENT

1. Petitioners contend (91-746 Pet. 10-19; 91-748 Pet. 18-20) that the jurors' use of the jury binders during deliberations violated petitioners' right to due process and to a jury trial. Specifically, petitioners argue that the binders distorted the evidence and were provided to the jury without the consent of the judge or the defendants as the result of misconduct by the prosecutor. That fact-specific contention was correctly rejected by the court of appeals and warrants no review by this Court.[3]

The initial question, as the court of appeals recognized, was whether petitioners suffered any prejudice as a consequence of the jury's consideration of the binders. Pet. App. 8. The conduct of the prosecutor, unless it had an impact on petitioners' sub-

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[2] Five judges dissented, arguing that the prosecutor had introduced "unauthorized" materials (the binders) into the jury room, and that the consideration of the binders by the jury raised the possibility that petitioners had been prejudiced because the binders contained a "tendentious compilation of exhibits already in evidence." Pet. App. 15-22.

[3] Petitioners have filed a motion in this Court requesting that the clerk of the court of appeals be required to transmit the jury binders to this Court for consideration in connection with the petitions for certiorari. We have no objection to petitioners' motion.

stantial rights, would not warrant reversal of the convictions. Fed. R. Crim. P. 52(a); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988). That rule applies even when the defendant alleges a due process violation based on the prosecutor's conduct. *United States* v. *Hasting*, 461 U.S. 499, 504-505 (1983); *Smith* v. *Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor."); see also *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1263-1266 (1991). As both the district court and the en banc court of appeals found, there was no prejudice to petitioners in this case, and a new trial is unwarranted.

Each of the exhibits contained in the binders had been admitted in evidence. Moreover, as the district court noted, the jurors had the binders available "on their laps for almost two months." Pet. App. 103. In those circumstances, the district court reasonably concluded that it need not declare a mistrial simply because the jury saw the binders during deliberations; the court indicated that it "was not error at all by virtue of the fact that every exhibit in that book was received in evidence." *Id.* at 148. The district court was within its bounds in finding that the use of the book would not distort the jury's deliberations. As the Seventh Circuit noted in a related context:

> The trial judge will always be in a better position than the appellate judges to assess the probable reactions of jurors in a case over which he has presided * * *. As we cannot put ourselves in the district judge's shoes in these matters we ought to accept his judgment unless we have a very strong conviction of error.

United States v. *Bruscino*, 687 F.2d 938, 941 (1982) (en banc), cert. denied, 459 U.S. 1211 (1983).

Best and Bewick argue (91-746 Pet. 10-12) that this case is akin to those involving *ex parte* contacts with jurors, or those in which jurors have received erroneously admitted documents or documents that were not admitted at all that described the government's theory of the case. The jury's consideration of binders of evidence that they had been using for weeks, however, is a far different matter from its exposure to outside materials or influences. It is difficult to see how the binders could permissibly be used throughout this lengthy trial (a procedure that petitioners did not challenge) and yet be considered prejudicial when they reached the jury room. Petitioners cite no case, and we know of none, in which a court has reversed a criminal conviction based on the submission to the jury of exhibits bound in a particular form.[4]

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[4] Each of the cases claimed by petitioners to conflict with the majority's decision (see 91-746 Pet. 19-20; 91-748 Pet. 12) involved the submission to the jury of erroneously admitted documents or documents that were not admitted at all. See *United States* v. *Pendas-Martinez*, 845 F.2d 938, 940-943 (11th Cir. 1988) (reversing convictions due to jury's consideration of inadmissible hearsay statement of Coast Guard officer); *United States* v. *Brown*, 451 F.2d 1231, 1233-1234 (5th Cir. 1971) (reversing convictions due to submission to jury of agent's notes, which were not admitted at trial and were "a neat condensation of the government's whole case against the defendant[s]"); *United States* v. *Adams*, 385 F.2d 548, 549-551 (2d Cir. 1967) (conviction reversed because district court allowed jury to review incriminating writing by government agent that had not been received in evidence); *Sanchez* v. *United States*, 293 F.2d 260, 267-269 (8th Cir. 1961) (reversal for erroneous admission of envelopes bearing hearsay notations by law enforcement agent); *United States* v. *Ware*, 247 F.2d 698, 699-701 (7th Cir. 1957) (same).

Petitioners suggest (91-746 Pet. 17) that "the majority gives a license to federal prosecutors * * * to send whatever they want to a deliberating jury, secure in the knowledge that the means by which the jury obtained the material is absolutely irrelevant." That contention is unfounded. The court of appeals did not hold that extraneous material may be sent to the jury; it held only that, when there is no prejudice to the defendants, the remedy of a new trial is not the proper means to address claims of prosecutorial misconduct. Nor did the court suggest that a prosecutor who circumvents court rules in sending material to the jury would be immune from administrative sanctions within the Department of Justice, or from being chastised in a judicial opinion. These remedies "allow the court to focus on the culpable individual rather than granting a windfall to the unprejudiced defendant" who has been convicted after a fair trial. See *Bank of Nova Scotia* v. *United States*, 487 U.S. at 263.

2. Petitioners assert (91-748 Pet. 11-15) that the district court's voir dire of the jurors was inadequate to ensure that they had not misused the binders during deliberations. The district court asked each juror whether he or she had used the binders and, if so, whether they were used to the exclusion of the other exhibits. See Pet. App. 134-147.[5] In response to the court's questions, the jurors explained that

[5] In asking those questions, the court understood that petitioners' argument was that the binders were "like a government's brief being in the jury room," Pet. App. 130, and the court sought to remove speculation that the binders were used to the exclusion of other evidence. As the court put it, "What I want to know is whether the use of these jury books resulted in their verdict irrespective of what they heard and irrespective of the evidence." *Id.* at 133.

although they used the binders during deliberations, they considered other exhibits "[m]ore so than the book, itself," *id.* at 134, that they "went through the files, and the charts, and everything," *id.* at 137, and that they "were in and out of all of those boxes, many more of those boxes than I suppose you'd even suspect. It was very interesting." *Id.* at 138. One juror explained that "[t]he only time we used the book is when we wanted to get into the file, and that was one item that was in the file. So rather than pass the one item around, everybody looked at the book." *Id.* at 139.

Conarty argues that the district court should have probed further into how each juror used his or her binder. 91-748 Pet. 13-15. That argument comes with poor grace from petitioners, who urged the district court that the only relevant question was whether the jury used the binders; if so, petitioners argued, a mistrial was mandated. Pet. App. 131-133.[6] In sum, once the district court was satisfied that the binders had not led the jury to ignore the evidence contained in the exhibit boxes, the court reasonably concluded that petitioners were not prejudiced. The court was not required to inquire further into the way the jurors used the binders.

3. Petitioners contend (91-746 Pet. 23-27; 91-748 Pet. 15-17) that the court of appeals misapplied the standard for determining whether a new trial was warranted. There is no dispute that the correct standard is whether there was a "reasonable possibility" of prejudice to the defendants from the jury's

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[6] Although the court indicated that it was willing to inquire whether the jurors looked at defense as well as government exhibits if petitioners' counsel wished, the defense specifically asked the judge not to do so. Pet. App. 141-142.

consideration of the binders. *United States* v. *Bruscino*, 687 F.2d at 940. Petitioners assert, however, that the court of appeals failed to conduct a sufficiently searching inquiry into the possibility of prejudice.

Both the district court and en banc court of appeals considered and rejected the claim that there was a reasonable possibility of prejudice in this case. The district court, which had the greatest familiarity with the contents of the binders and their likely effect on the jury in light of all the circumstances of the trial, found no prejudice "by virtue of the fact that every exhibit in that jury book was received in evidence." Pet. App. 148. The en banc court of appeals similarly rejected the "only contention of prejudice"—that the arrangement of documents in the binders was a "roadmap[]" to conviction. Pet. App. 10. As the court of appeals noted, petitioners did not object when the binders were distributed to the jury during trial; petitioners themselves "frequently directed the jury's attention to the binders in order to focus the jurors on a particular document or transaction"; the district court ascertained that all the exhibits in the binders were admitted into evidence; and the binders had been used by the jurors routinely throughout the seven-week trial. *Ibid.* Against that background, the court of appeals had a sufficient basis for concluding that there was no "reasonable possibility" that the presence of the binders improperly influenced the jury's deliberations.[7]

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[7] Petitioners cite several court of appeals cases (91-746 Pet. 24) for the proposition that "[w]hen unauthorized material is present in the jury room, the government must demonstrate, beyond a reasonable doubt, that its presence did not affect the verdict." The cited cases, however, do not apply

4. Finally, Best and Bewick argue (91-746 Pet. 27-29) that the district court was required to obtain sworn statements from the prosecutor and the FBI case agent before resolving the motion for a new trial. Both the prosecutor and the case agent submitted statements in the form of affidavits (although they were not notarized), Pet. App. 77-83, and they were prepared to give sworn testimony regarding petitioners' allegations. *Id.* at 8. In light of the court's finding that there was no possibility of prejudice, however, the court correctly concluded that the issue of how the binders got into the jury room had become moot. There was, therefore, no need for the district court to determine the facts surrounding that issue or to consider whether the absence of a notary seal from the governments' initial affidavits should be given any weight.

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here; in each the jury considered materials that were not admitted into evidence. *United States* v. *Tebha*, 770 F.2d 1454, 1456 (9th Cir. 1985) (consideration by jury of exhibit that was not admitted in evidence); *United States* v. *Jonnet*, 762 F.2d 16, 18-20 (3d Cir. 1985) (entire deposition transcript sent to and used by jury where district court had ruled that only portions of transcript were to go to jury); *United States* v. *Littlefield*, 752 F.2d 1429, 1431-1432 (9th Cir. 1985) (use of issue of *Time* magazine brought in by juror). In this case, the evidence as arranged in the binders had properly been before the jury during the seven weeks of trial.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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